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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 333

MAMIYE BROS., ET AL.,
Petitioners,

—against—

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

—against—

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

GELMART KNITTING MILLS, INC., ET AL.,
Petitioners,

—against—

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

—against—

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

ISAAC COHEN & SONS CORP., ET AL.,
Petitioners,

—against—

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

—against—

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

The Opinion Below

The opinion of the Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York, has not as yet been officially reported. It and the judgment of affirmance are printed as an Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals is dated April 13, 1966 and was entered on the same day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question of Law Presented

Did Hurricane "Donna"—an act of God—exonerate a pier operator and an ocean carrier from all liability for the loss of goods, when (legally charged with knowledge of both the erratic nature of hurricanes in general, and the severity of "Donna" in particular) they failed to take any preventative action to protect the goods before voluntarily closing down the pier for a period of 63 hours, during which, as they well knew, they would be paralyzed to act?

Statement of the Case

Petitioners were the owners or consignees of goods, which were accepted by the respondent carriers in

apparent good order and condition. The goods were damaged by harbor water on September 12, 1960, during the passage of Hurricane "Donna", while on Pier 5, Bush Terminal, Brooklyn, New York. The carriers had no office (32a*) and no employees on the pier (34a). They chose to have all work on their behalf done by the impleaded terminal operator (33a).

Hurricane "Donna" was first observed on September 2, 1960 (216a). From its early stages the Weather Bureau warned that "Donna" was a severe hurricane (29a, 30a; 101a). It repeated this warning time and again (101a). The Weather Bureau also repeatedly warned, that when near land masses "Donna" was causing high tides (30a; 102a). It is the policy of the Weather Bureau to confine its advisories to a 24 hour period (15a; 98a).

There are two normal or astronomical high tides every 24 hours in New York harbor (129a). "Donna" struck New York harbor during one of these high tides (127a), and as a result the water reached a higher point than during any previous storm (129a, 130). However, the surge height of the water in New York harbor during "Donna" was considerably less than the surge height of water during the storm of November 25, 1950 (128a).

Since 1938 hurricanes along the east coast of the United States have been more frequent than in any other known period (103a). This has been due to a warming of the earth (103a). Seven hurricanes

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* Figures followed by "a" refer to pages of appellant's appendix, Volume I of certified record.

Figures followed by "App." refer to appendix to this petition.

affected New York harbor between 1938 and 1960 (151).

A hurricane packs winds of more than 75 miles per hour, moving counterclockwise around a center, usually referred to as the eye of the storm (215a). No two hurricanes follow the same track (95a, 96a; 148a). They cross and recross in all directions (96a), and some will accelerate 1500 per cent in a 24 hour period (96a).

The climax of the hurricane season along the Atlantic Coast is the first 10 days of September (14a; 97a). In fact, in any September there is a 92 per cent chance that there will be at least one hurricane somewhere in the Atlantic, and a 42 per cent chance that there will be three or more (97a).

In September, hurricanes that develop in the Cape Verde region tend to recurve northward around the western edge of the "Bermuda High" (9a; 97a). "Donna" was a Cape Verde type of storm (8a). Recurvature in September, while not invariable, is more frequent than not (218a).

When a hurricane moves northward its speed and direction are more uncertain than when it is moving westward (14a). It is most difficult to forecast the point of recurvature (218a). Indeed, the forecasting of hurricanes is more an art than an exact science (14a).

The diameter of the destructive winds of a hurricane can be in excess of 300 miles (13a). The rise in the water level may begin when a hurricane is as

much as 500 miles away (100a). This is known as "hurricane surge" (100a), which is defined as the difference between the astronomical tide and the actual tide (215a, 216a).

"Donna" first showed a tendency to turn from a westerly to a northerly direction at 7:00 A.M. (E.S. time) on Friday, September 9, 1960 (108a, 109a; Exh. 1 at 187a). There was nothing unusual about "Donna" recurving at the point where it did recurve (105a). Other hurricanes had recurved to the north at points to the west of, or near, where "Donna" recurved (104a, 105a, 108a).

Atlantic Stevedoring Co. Inc., the terminal operator at Pier 5 and the impleaded respondent, learned of the existence of "Donna" during the early part of the week previous to Monday, September 12, 1960 (39a; 167a). It knew that "Donna" was a very severe storm accompanied by high tides (167a, 168a). It knew that September is part of the hurricane season along the Atlantic seaboard (40a), and that "several years in a row we had a lot of them" (40a). Indeed, the terminal operator was charged with knowledge of the erratic nature of hurricanes. *General Public Warehouse Co.* v. *Queen Line, Ltd.*, 177 F.Supp. 916, 920, 921.

Pier 5 had been flooded over during previous storms (224a). The terminal operator was also charged with knowledge of this important fact. Official Government statistics, readily available to anyone, reveal that Pier 5, which is 10 feet above mean low water (221a), was seriously threatened during several prior storms when the harbor water rose to

dangerous heights (Exhs. 9 and 10 at 190a, 191a, 192a).

Had the terminal operator been watching the progress of "Donna" on Friday, September 9th—as was its duty—it would have known that "Donna" first turned from a westerly course to a northerly one at 7:00 A.M. that morning (108a, 109a)—some 9 hours before Pier 5 was voluntarily closed for a 63-hour period.

Why then did the terminal operator voluntarily close down the pier for a 63-hour period—during which it knew it would be paralyzed to act? The answer was given by the terminal operator itself, when it conceded that it was company policy to take hurricane precautions only after receiving official information that a hurricane would hit New York City (41a, 42a). The New York Weather Bureau expert-witness for the carrier stated that no such warning would be given until a hurricane was just south of Cape Hatteras (138a). He acknowledged, that with a hurricane accelerating to the northeast at the rate of 40 miles per hour, it would take only 8 hours for it to go from Cape Hatteras to New York (141a).

By a favorable coincidence one vessel was partially discharged of cargo on Friday, September 9th (222a), while another was being loaded (222a). According to the terminal manager, had the cargo from the discharging vessel been placed on a base three pallets high on Friday, it would only have taken an additional five or six hours to place the remaining cargo on a similar base (171a). Again, according to the terminal manager, had the loading of the second vessel been

completed on Saturday, the entire cargo might have been loaded by that night (172a). The pier had been worked in the past "many times" on Saturdays, and "plenty of times" on Sundays (174a). Accordingly, it was not a lack of available work which prevented the terminal operator from operating the pier on Saturday and/or Sunday. The sole reason for the failure to do anything to protect the cargo, was the terminal operator's adherence to its predetermined and negligent policy of doing nothing until official information was received that a hurricane would hit New York (41a, 42a).

Reason for Granting the Writ

The position taken by the Court of Appeals for the Second Circuit, in upholding the conclusion of the Trial Judge that the respondents and impleaded respondents were not negligent in failing to take any steps to protect the cargo prior to the day "Donna" struck New York harbor, is in direct conflict with the position taken by the Court of Appeals for the Third Circuit, in upholding the contrary conclusion of a Trial Judge involving the same hurricane "Donna" in the same harbor of New York.

Three months before these consolidated admiralty suits were tried before Judge Wyatt of the Southern District of New York, the non-jury case of *World Products, Inc.* v. *Central Freight Service, Inc.*, 222 F. Supp. 849 was decided in favor of the plaintiff by Judge Augelli of the District of New Jersey. About three months before Judge Wyatt filed his opinion, the Court of Appeals for the Third Circuit, at 342 F2

290, affirmed Judge Augelli's conclusion that, a warehouseman who stored goods on a pier during Hurricane "Donna", was negligent in failing to make any effort to protect the goods from rising waters.

A.

The World Products Case.

1. The Facts of the World Products Case:

The defendant's warehouse was located on a pier over the Hudson River at Edgewater, New Jersey. This place is about eight miles from Pier 5, Bush Terminal. Plaintiff's pipe fittings in the warehouse were damaged by rising river water during Hurricane "Donna" on September 12, 1960. At the time the pipe fittings were stored on approximately four inches of dunnage.

2. The Evidence for the Defendant in the World Products Case:

Judge Augelli, at page 852 of his opinion summarizes the defendant's evidence as follows:

> "In order to rebut the presumption of negligence on its part, defendant introduced evidence that the flooding of its Edgewater warehouse could not have reasonably been guarded against or anticipated. The testimony was that during the seven years defendant occupied the warehouse prior to 'Donna', the river tide had never risen to the level of the warehouse floor; that 'Donna' was the first hurricane to pass within 50 miles of New York in those seven years; that no sufficient

warning was given by the Weather Bureau concerning the high tides; that even if defendant had adequate warning, it could not have moved plaintiff's merchandise in time because of the lack of available storage space and the total volume of other merchandise on the floor; and that increasing the dunnage would have been futile because of the height attained by the flood water in the building."

3. The Evidence for the Plaintiff in the World Products Case:

Judge Augelli, also on page 852 of his opinion, summarizes the plaintiff's evidence as follows:

"On the other hand, there was testimony, favorable to plaintiff, that as much as 70% of the first floor of the Edgewater warehouse was, at normal high tide, three to four feet above the water of the Hudson River; that defendant should not have stored goods over the river without making an investigation of the tides in the area during storms; that such an investigation would have disclosed that on a number of occasions prior to 'Donna', the waters of the Hudson must have risen to or above the level of the warehouse floor; that defendant received adequate warning, a day or two before, that a hurricane was moving up the Atlantic Coast; that defendant should have been aware of Weather Bureau Reports from New York City, about twelve hours before the full force of the hurricane struck Edgewater, concerning the approach of the storm and the forecasted high tides; that

defendant took no precautions to protect the goods in the warehouse from flood damage either before or after it learned of the approaching hurricane; and that the use of additional dunnage by the defendant would have mitigated or avoided the loss, but was not attempted.'"

4. The Conclusion of Judge Augelli, and Its Affirmance By the Court of Appeals:

After noting that Hurricane "Donna" qualified as an act of God, Judge Augelli correctly stated that:

> "* * * the question still remains whether the storm was the sole cause of the damage to plaintiff's goods. In other words, if defendant did not exercise reasonable care in storing plaintiff's fittings, and if that failure was a proximate cause of plaintiff's loss, then defendant would not be relieved of liability by the Act of God". (Judge Augelli's Opinion, pp. 851 and 852)

After applying this law to the above quoted facts, Judge Augelli concluded that the defendant was negligent in not taking sufficient precautions to protect the goods.

In affirming the conclusion of Judge Augelli on the question of negligence, the Court of Appeals for the Third Circuit, at 342 F2 290, 291 stated:

> "We agree with the conclusions of the court below on the liability of defendant and on the validity of the limitation of liability provision of the warehouse receipt. On this we can add nothing to the reasons well stated by Judge Augelli in his opinion reported in 222 F.Supp. 849".

B.

The Reaction of Judge Wyatt to the World Products Case.

Judge Wyatt in a special section of his opinion labelled "The World Products decision" (231a, 232a) said: "There appear to be distinctions in fact between that case and the case at bar". Then after noting what he conceived to be two distinctions (we shall discuss each in the following paragraphs) the Judge added, "If there are no valid distinctions in fact between the two cases, then I must respectfully disagree with the result reached in the World Products case" (232a).

The first factual distinction Judge Wyatt perceived between the World Products case and the instant cases was that the floor of the Edgewater warehouse pier "was 7.6 to 8.6 feet above mean low water whereas Pier 5 was 10 feet above mean low water" (231a). Accordingly, the Edgewater pier was 2.4 to 1.4 feet lower than Pier 5.

This difference in height between the two piers could not have been significant enough to warrant different conclusions. Obviously, a pier eight miles up the Hudson River at Edgewater would not face the same menace from wave action and storm surge as a pier in Brooklyn with a wide expanse of water in front of it. And this is exactly how it turned out during Hurricane "Donna". At Edgewater "The tide waters of the Hudson River rose about four feet above the mean high water mark, and entered the first floor of defendant's main Edgewater warehouse", 222 F.

Supp. 849, 850. (Judge Augelli found that 70% of the Edgewater Pier was three to four feet above water at normal high tide, 222 F. Supp. 849, 852). On the other hand, Judge Wyatt found in connection with Pier 5 that "* * * the evidence is that water came up on September 12 to a height of 22 to 36 inches above the floor" (230a).

Therefore, in both theory and in practice there were good reasons why the Edgewater pier did not have to be as high as Pier 5.

The second factual distinction Judge Wyatt perceived between the World Products case and the instant cases, he described as follows:

> "The Court (Judge Augelli) also found that 'on a number of occasions prior to 'Donna', the waters of the Hudson must have risen to or above the level of the warehouse floor' (222 F. Supp. at 852)" (231a, 232a).

Certainly, the prior flooding of the Edgewater pier provides no distinction from the situation at Pier 5, because Judge Wyatt found as a fact that Pier 5 had also been flooded during prior storms (224a).

C.

Any Comparison of the Fact Situations Pertaining to the World Products Case and the Instant Ones Is Favorable to Petitioner's Position.

Pier 5 Bush Terminal was an operating pier, with all the mobility that implies. It "would support

cargo weight of about 4000 tons" (222a), but at the close of business on Friday, September 9 the pier was occupied by cargo weighing only about 2500 tons (222a). It had an asphalt roadway, 50 to 60 feet wide, down the center (222a), and it was large enough so that "Four ships could tie up alongside the pier at any one time" (222a).

The Edgewater pier was used solely as a warehouse. Because of the total volume of merchandise on the floor it could not be moved due to a lack of available storage space.

Unlike the warehouseman on the Edgewater pier, Atlantic Stevedoring Co. on Pier 5 had the unique advantage of an opportunity to take preventive measures while the "Toreador" was unloading on Friday, September 9th. In addition, it could have completed loading the "Turandot" on Saturday, September 10th.

It is certainly much easier, and less expensive, to place discharging cargo on a high base of pallets than it is to place additional dunnage under goods already tightly stowed in a warehouse. As Judge Wyatt sensed, there are no valid distinctions between the two cases (unless, as we claim, they are favorable to these petitioners).

D.

The Comments of the Court of Appeals for the Second Circuit on the World Products Case.

Despite appellants strong reliance upon the *World Products* case, the Court of Appeals confined itself to the following inadequate comment:

> "Although Judge Wyatt pointed to some differences of fact between the two cases, see 241 F. Supp. at 119, determination whether these or others were significant would require us to engage in a scrutiny of the record of *World Products* as thorough as we have made of the record here. In view of the firm conclusion we have reached after full consideration of this well tried and well argued case, we do not believe that effort would be rewarding" (15 App.)

It was not necessary for the Court of Appeals for the Second Circuit "to engage in a scrutiny of the record of *World Products* as thorough as we have made of the record here" (15 App.). Judge Augelli in his opinion in *World Products, Inc.* v. *Central Freight Service, Inc.*, 222 F. Supp. 849, 852, gave an exceptionally detailed summary of both the plaintiff's and defendant's evidence before reaching his conclusion of negligence. If the reasoning of the Court of Appeals for the Second Circuit were to be considered valid, there would be little chance for this Court to resolve conflicts between the Circuits, because few Courts of Appeal are likely to scrutinize the records of cases decided in other circuits.

E.

There Being No Substantial Distinction Between the Facts of The World Products Case and the Ones Which are the Subject of This Petition, the Judgments of the Courts of Appeal for the Third and Second Circuits, Respectively, Are in Conflict.

Hurricane "Donna" was the "act of God" considered in both the Second and Third Circuit cases. The damaged goods in both cases were located on piers in the same harbor of New York. Obviously, the same weather reports were available to the pier operators of both piers, each of whom—despite previous floodings of their piers—failed to take any preventative steps to protect the goods in their custody prior to the day of "Donna's" arrival. Yet, in the Third Circuit the pier operator was held to be negligent, while in the Second Circuit it was held to be not negligent.

A determination of negligence—or the absence of negligence—is a conclusion of law. *Romero* v. *Garcia & Diaz, Inc.* (2 Cir.), 286 F2 347, 355, cert. den. 365 U.S. 869; *Great Atlantic & Pacific Tea Co.* v. *Brasileiro* (2 Cir.), 159 F2 661, 665, cert. den. 331 U.S. 836; *Sidney Blumenthal & Co.* v. *Atlantic Coast Line R. Co.* (2 Cir.), 139 F2 288, cert. den. 321 U.S. 795. In fact, in the cases which are the subject of this petition, the Court of Appeals for the Second Circuit, once again reaffirmed this principle of law (8, 9 App.). Accordingly, a situation has been created where the Second and Third Circuits have reached conflicting conclusions concerning an important matter of law—negligence.

F.

The Questions Here Involved Are of Basic Importance, Since Circumstances Analogous to Those Which Caused the Damage During Hurricane "Donna", Are Likely to Recur at Any Time in the Future, and Result in Serious Losses. Accordingly, the Final Resolution of These Conflicting Decisions is of Direct Concern to Many Interests Other Than the Parties to These Suits.

The frequency of Atlantic hurricanes in recent years, makes it reasonable to assume, that the most highly industrialized area in the world, can expect similar visitations in the years to come. Is the New York harbor pier operator of the future to be guided by a common rule of law, or does the applicable rule of law depend upon the mere circumstance of his location on either the east or west side of the harbor (the territories of the Second and Third Circuits, respectively)? Or, to put it another way, when a pier operator in New York harbor knows of the existence of a raging Atlantic hurricane, at the peak of the September hurricane season, is he legally justified in doing nothing before receiving official notice that the storm will strike New York (a matter of some eight hours notice) or must he take some prior preventative steps?

Petitioners believe that the Second and Third Circuits cannot both be correct. Judge Wyatt seemed to recognize the essential factual similarity between the two cases, when he frankly stated, "If there are no valid distinctions in fact between the two cases, then I must respectfully disagree with the result reached

in the World Products case" (232a). The Court of Appeals for the Second Circuit in a footnote comment said, "Although we do not here follow what claimants assert the Third Circuit's decision to be, we ought to be in a position to compel a district court to follow a sister circuit's conclusion with respect to negligence in similar circumstances if we were so advised" (7 App.).

While, of course, one circuit cannot be forced to follow a sister circuit's conclusion on an issue of negligence, this Court has the historic right to enforce uniformity. As matters now stand it cannot be reasonably and fairly said that the facts of the *World Products* case compel one conclusion on negligence, while the facts of the instant cases compel a contrary conclusion. On the face of it, one circuit or the other must be wrong. A perpetuation of the error, wherever it may be, can only lead to confusion in the future, when that inevitable phenomenon of nature and act of God—the hurricane—strikes again, causing tremendous financial losses.

CONCLUSION

By reason of the premises, a writ of certiorari should issue to review the decision of the Court of Appeals herein.

Dated: July 8, 1966.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 155—September Term, 1965.

(Argued December 14, 1965 Decided April 13, 1966.)

Docket No. 29939

MAMIYE BROS., *et al.*,

Libellants-Appellants,

—v.—

BARBER STEAMSHIP LINES, INC., *et al.*,

Respondents-Appellees and Cross-Appellants,

—v.—

ATLANTIC STEVEDORING CO. INC., *et ano.*,

Impleaded-Respondents —Cross-Appellees.

GELMART KNITTING MILLS, INC., *et al.*,

Libellants-Appellants,

—v.—

BARBER STEAMSHIP LINES, INC., *et al.*,

Respondents-Appellees and Cross-Appellants,

—v.—

ATLANTIC STEVEDORING CO. INC., *et ano.*,

Impleaded-Respondents —Cross-Appellees.

ISAAC COHEN & SONS CORP., *et al.*,

Libellants-Appellants,

—v.—

BARBER STEAMSHIP LINES, INC., *et al.*,

Respondents-Appellees and Cross-Appellants,

—v.—

ATLANTIC STEVEDORING CO. INC., *et ano.*,

Impleaded-Respondents —Cross-Appellees.

Before:

WATERMAN, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeals from a decree of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, 241 F. Supp. 99 (1965), dismissing libels against carriers to recover for hurricane damage to cargo on a Brooklyn pier. Affirmed.

VINCENT L. LEIBELL, JR. (Bigham, Englar, Jones & Houston, New York, N. Y.; Charles W. Harvey and Christopher R. Knauth, of Counsel), *for Libellants-Appellants.*

ELI ELLIS (Hill, Betts, Yamaoka, Freehill & Longcope, New York, N. Y.; Robert H. Peterson and Robert W. Mullen, of Counsel), *for Impleaded-Respondents—Cross Appellees.*

TALLMAN BISSELL (Haight, Gardner, Poor & Havens, New York, N. Y.; Thomas R. H. Howarth and Philip V. Moyles, of Counsel), *for Respondents-Appellees and Cross-Appellants.*

FRIENDLY, *Circuit Judge*:

These libels, consolidated for trial before Judge Wyatt in the District Court for the Southern District of New York, see 241 F. Supp. 99 (1965), were brought to recover for damage to cargo on Pier 5, Bush Terminal, Brooklyn. The cause of the damage was a flooding of the pier due to storm surge and wave action created by Hurricane Donna which struck New York harbor in the early afternoon of Monday, September 12, 1960. The pier was 10′ above mean low water, as against 9′ required by New York City, but the unusually high level of the water covered the floor to a considerable height.[1] Some of the cargo was inbound, having been unloaded on or before Friday, September 9, from the M/V Toreador, the M/V Tatra and the M/V Turandot; other cargo was outbound, having been delivered on or before September 9 for shipment on the Turandot and the Tatra. The respondent shipowners impleaded Atlantic Stevedoring Co., the pier operator, which carried the burden of the defense. After trial Judge Wyatt dismissed the libels on the ground that the loss was attributable to an "Act of God" within the meaning of the Carriage of Goods

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[1] According to Judge Wyatt's calculations, all cargo on the floor of the pier would have been in 8″ to 9″ of water, and cargo on a single pallet in 2″ to 3″, but wave action must have raised the water level on the pier as high as 36″. 241 F. Supp. at 115.

by Sea Act, 46 U. S. C. §1304(2)(d).[2] In a thorough opinion, he recognized that under the statute the carriers and pier operator were liable for damage to the cargo caused by their negligence and had the burden of showing either freedom from negligence or that the loss could not have been prevented by the exercise of reasonable care. He held, however, that in view of the Weather Bureau estimates as to the probable course of the hurricane they had not been negligent. On appeal no one challenges his analysis of the governing legal principles; the attack by the cargo owners is on the correctness of his conclusion that the burden of negating negligence was satisfied.

I

We are confronted at the outset by appellees' contention that the only issue before us is whether the district court's conclusion of lack of negligence was clearly erroneous. Appellees recognize the many decisions of this court which hold that, with respect to negligence as distinguished from the evidentiary facts on which it is based, a judge's determination is not entitled to the benefit of the "unless clearly erroneous" rule either in admiralty or in actions governed by F. R. Civ. P. 52(b); they suggest, however, that most of these cases antedated *McAllister* v. *United States*, 348 U. S. 19 (1954), and that in any event they cannot stand in the face of that decision.

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[2] The court held that under the agreements of carriage COGSA was to determine rights and duties with respect to both inbound and outbound goods on the pier. 241 F. Supp. at 105-06. This decision is not here challenged.

The attempt to whittle down the precedents in this court must fail. In *Romero* v. *Garcia & Diaz, Inc.*, 286 F. 2d 347, 355-56, cert. denied, 365 U. S. 869 (1961), where we adhered to our long-standing rule, we cited three earlier post-*McAllister* decisions in which this court, speaking through eminent judges, had done precisely that. *Dale* v. *Rosenfeld,* 229 F. 2d 855, 858 (1956) (Swan, *J.*); *New York, N. H. & H. R.R.* v. *Gray,* 240 F. 2d 460, 465 (Frank, *J.*), cert. denied, 353 U. S. 966 (1957); and *Verbeeck* v. *Black Diamond S.S. Corp.,* 269 F. 2d 68, 70 (1959) (Clark, *J.*), cert. denied, 361 U. S. 934 (1960). To this list we can now add *Kane* v. *Branch Motor Express Co.,* 290 F. 2d 503, 506-07 (1961), and, dealing with a somewhat different but related subject, *Ellerman Lines, Ltd.* v. *The S.S. President Harding,* 288 F. 2d 288, 291-92 (1961). We find nothing to the contrary in *Castro* v. *Moore-McCormack Lines, Inc.,* 325 F. 2d 72, 75 (1963); rather that opinion recognized our established rule. However, the recurrent arguments on this point and the earnestness of appellees' presentation make further consideration appropriate.

The standard explanation of our rule was stated in *Romero* as follows: "determination of negligence involves first the formulation and then the application of a standard of conduct to evidentiary facts bound to be established. When all this has been done by a judge, a reviewing court has no means of knowing whether he formulated the standard correctly, since he does not charge himself. Thus there must be free review of his ultimate determination of negligence although not of the facts on which it was based." See also *Kane* v. *Branch Motor Express Co., supra,* 290 F. 2d at 506-07. Appellees say in effect, although they phrase it more politely, that this is mumbo-jumbo.

Since every first-year law student knows what the standard of care is, how can an appellate court seriously wonder whether an experienced trial judge was aware of it? Particularly, how can any doubt be entertained on this score if the judge has correctly repeated the familiar formula? Does it not then follow that what the appellate court is attempting to oversee, at least in most cases, is the interpretation of particular circumstances in the light of a known rule of law? Is not such work the proper business of the trial courts, subject to review only under the "unless clearly erroneous" standards? And, however the argument on principle might stand, is not this what the Supreme Court decreed in *McAllister*?

The argument on principle makes many over-simplifications that fail to take into account the elaborations of the general standard of care and the need for consistency in judicial decision. Of course we do not doubt the knowledge of the district judges that the overall standard of conduct to which an actor "must conform to avoid being negligent is that of a reasonable man under like circumstances." ALI, Restatement (2d), Torts §283 (1965). But this is a long way from being the whole story. That simple phrase in the Restatement is accompanied by two pages of explanation; twenty-five more sections, §§285-309, with comment spreading over eighty pages, are devoted to further specifications of the general standard. The law of negligence has thus followed the path anticipated in the celebrated passage of Holmes' lectures of 1881, fulfilling "the tendency . . . to become more and more concrete by judicial decision and by statute" without interfering with "the general doctrine maintained as to the grounds of liability." The Common Law 89-103 (Howe ed. 1963). This very case presents

issues whether the judge gave adequate weight to the principle that "As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less," Prosser, Torts 151 (3d ed. 1964), and whether, as appellants claim, he acted on the erroneous view that unless all the cargo could be protected from damage, none needed to be. Save when the trial judge has gone to unusual lengths in his opinion, the only way in which an appellate court can determine whether he correctly apprehended these manifold specifications of the general standard is by reviewing his result, and if that review is to be effective, it must be unimpeded. Beyond this the need for consistency militates against considering a judge's application of even an admitted legal standard as a finding of "fact" subject to F. R. Civ. P. 52(b) or its admiralty analogue, even though a jury's doing the same would constitute a determination of "fact" protected by the Seventh Amendment. It would be shocking if contrary decisions of two district judges in this circuit on the self-same facts had to be left standing, although there would be no similar shock if such a divergence should happen as a result of the deliberation of two different juries. Compare *United States* v. *Maybury*, 274 F. 2d 899 (2 Cir. 1960). Yet uniformity within a circuit or among circuits[3] can be achieved only if appellate review of the application of a legal standard is free of the shackles of the "unless clearly erroneous" rule.

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[3] As will be seen from the final paragraph of this opinion, claimants suggest it would be shocking if the Second and Third Circuits were to reach what they contend to be different results. Although we do not here follow what claimants assert the Third Circuit's decision to be, we ought to be in a position to compel a district court to follow a sister circuit's conclusion with respect to negligence in similar circumstances if we were so advised.

This leaves the question whether *McAllister* compels a conclusion that our decisions are wrong as a matter of authority, however wise we may think them to be on principle. What proved to be the crucial issue in that case was not negligence, as to which this court had indicated a somewhat hesitant willingness to go along with the district judge's conclusion, but causation, see 207 F. 2d 952, 954-55 (2 Cir. 1953); with respect to that question, this court, speaking through Judge A. N. Hand, did not specify what standard of review it was using. The brief opinion of Mr. Justice Minton assumed that we had applied the "unless clearly erroneous" standard, saying "We do not find that the Court of Appeals departed from this standard, although we do disagree with the result reached under the application of the standard." 348 U. S. at 20. Taking this literally, one could argue that the decision laid down no legal doctrine at all but simply resolved a controversy over facts in favor of the view taken by the district judge. See Staring, Appeals in Admiralty Cases, 35 Tulane L. Rev. 1, 47-50 (1960). But it can be answered that since the Supreme Court ought not to have reversed us if in fact our power went beyond the rejection of a clearly erroneous finding, the Court necessarily decided that causation was a question of "fact" on which the decision of a district court was reviewable only for clear error. Accepting this broad reading for present purposes, we note that the issue in *McAllister* was simply whether the plaintiff had borne his burden of showing the probability that defendant's negligence rather than other circumstances caused the injury, as distinguished from questions of causation involving a mixture of law and fact such as whether the negligence was the "proximate" or "legal" cause. Finding no discussion in the Supreme

Court's opinion directed at what could be considered application of a legal standard to established facts, we adhere to our long-held view that a judge's determination on the issue of negligence does not fall within the "unless clearly erroneous" rule.

II.

Hurricane Donna was first identified on September 2, 1960, as a severe hurricane several hundred miles east of Puerto Rico, but no one then regarded her as presenting any immediate threat to the northeastern United States. In the following week she moved slowly, in a generally westerly direction, passing north of Puerto Rico and Cuba and aiming toward the Florida keys and thence into the Gulf of Mexico. However, hurricanes on this general course are often subject to a phenomenon known as recurvature—a turn to the north or northeast as a result of encountering southerly and westerly winds near the western end of the Bermuda High, a large high pressure area of varying length which extends west from the Azores. The point at which recurvature occurs, whether off the east coast of the United States or in the Gulf of Mexico, depends on the length of the Bermuda High which tends to shorten progressively from August through the fall months; when recurvature occurs, the hurricane not only changes direction but accelerates from a speed of some 12 miles per hour to several times that rate.

According to the Chief of the National Hurricane Center, a specialized research and warning service of the United States Weather Bureau stationed at Miami, Donna's recurvature began at 7:00 A.M. EST on Fri-

day, September 9, "when it changed from a predominantly western trajectory, first to west-northwest and later to northwest." However, the "advisories" issued by the Weather Bureau during that day did not make alarming news out of this; the 5 P.M. advisory, noting the north-northwest course and the reduced speed of 9 mph, predicted "no material change . . . in intensity, speed or direction during the next 12 hours," and the 11 P.M. advisory went only so far as to forecast that "the direction of movement will likely change to slightly more northerly." In fact, until late in the evening of Saturday, September 10, the Hurricane Center expected that over the weekend Donna would pass up the Gulf of Mexico some 60 or 70 nautical miles west of Tampa, cross the Florida coast near Cedar Key, and then move northeast off Cape Hatteras by early Monday. Instead, the center of the hurricane hugged the west coast of Florida only as far as the Tampa area, then turned northeast across the state, and moved up the Atlantic Coast at a considerably greater speed than the experts anticipated. No Weather Bureau report extending hurricane warnings to include New York was issued until Sunday, September 11, at 10 P.M. EDT; although this correctly estimated that Donna would reach the latitude of New York on Monday morning, it erroneously predicted her passage a short distance off the eastern end of Long Island. Later, at 11:55 P.M., the New York Weather Bureau issued a local statement warning that tides on Monday morning might be as high as 5′ to 8′ above normal from the northern New Jersey shore to Long Island; the following morning's report repeated this forecast but added that in New York harbor tides would be about 3′ to 4′ above normal. In fact, traveling somewhat west of the anticipated course, the "eye"

of the hurricane brushed the New Jersey shore, and between 2:30 and 3:30 P.M. on September 12 passed over central Long Island. The ensuing storm surge in New York harbor was unusually great because of the unprecedented width of the eye and the proximity of its northeastern quadrant where surge is maximized. With Donna hitting exactly at the time when the astronomical tide reached its peak of 4.5′, New York harbor experienced the highest recorded water level in its history some 10.7′ to 10.9′ above mean low water in the area of the Bush Terminal.

The claimants do not criticize the conduct of the pier operator once the Sunday evening advisories had been issued. The terminal superintendent got down early on Monday morning and, finding that the Turandot and the Tatra refused to open their hatches for loading because of heavy rain, put the stevedores who had been ordered for 8 A.M. to work in nailing up doors, affixing tarpaulins, and placing additional pallets under cargo; only some 3% to 5% of the cargo had been raised by extra pallets when the flooding occurred. What the claimants do criticize is the operator's failure to take precautions before then. Their case centers on the point that under the practices of the Waterfront Commission labor for Saturday, Sunday and Monday must be ordered by 3 P.M. on Friday.[4] They say that a pier operator who closes down his pier knowing he will be immobilized

[4] The terminal superintendent testified that matters were not quite this inflexible; that if he had learned of the danger by 6 P.M. on Friday, he "could have done something about it," but that by Saturday morning he "could not have done very much." Apparently the difficulty is that hiring must be in accordance with seniority schedules which cannot be altered without approval of the Waterfront Commission and/or the union.

for 63 hours must take substantially greater precautions than one who will regain freedom of action in fifteen. The prudent course under the circumstances, they urge, would have been to hire men for the weekend, place extra pallets under the inbound cargo unloaded on Friday or, at least, so much of it as could be feasibly protected in that fashion, and load the outbound cargo on Saturday and Sunday. They say that, despite the lack of official warnings, such action was demanded by a combination of the known severity of Donna, a history of some previous flooding, the unpleasant habit of hurricanes to recurve and threaten the northeast, particularly in early September, and the unpredictability of their course and speed once recurvature has set in.[5] Even conceding that reliance on Weather Bureau warnings is a reasonable course of conduct for a pier operator who will resume business on the following morning, the claimants stress that the forecasts are confined to a 24-hour period; they say that when a person disables himself from acting for longer than that, he must bear the consequences of what may have seemed only a slight risk at the time of decision. Though we agree that the irreversible character of a decision is highly relevant to the risk, we concur with the district judge that the pier operator did not fail to exercise the care it was bound to take with the knowledge it had or ought to have had before closing down on Friday.

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[5] The Chief of the National Hurricane Center conceded that a book, "Atlantic Hurricanes," of which he was co-author, stated that "hurricanes slow, speed up and slow again, and they move towards the west, turn towards the northwest or north for a day or so, resume a westward course, make right angle turns, loop the loop and do all the things a good broken-field football carrier will do."

An actor is required to know "the qualities, characteristics, and capacities of things and forces in so far as they are matters of common knowledge at the time and in the community," Restatement (2d), Torts §290(a). This will suffice unless he is "engaged in an activity, or stands in a relation to others, which imposes upon him an obligation to investigate and find out, so that he becomes liable not so much for being ignorant as for remaining ignorant." Prosser, Torts 163 (3d ed. 1964). The pier operator clearly met the less stringent test; there was no general knowledge in the New York community of the probable approach of Donna until Sunday evening. And even if the claimants are right in saying that the situation on Friday afternoon had sufficient elements of danger that the operator should have made further inquiry before immobilizing itself for 63 hours, there is no evidence that the knowledge which it would thus have obtained and with which it must be charged should have led to a different course of conduct. If the operator had communicated with the meteorologist in charge of the New York Weather Bureau, it would have learned that, as he later testified, he was not then "very excited about it [Donna] affecting the New York City area, especially over the weekend." If it had gone still further and telephoned the Chief of the Hurricane Center at Miami, it would have found he expected that the center of the hurricane would be on the West Florida Coast on Saturday evening and, had he been able to anticipate a forecast in fact made the next day, that on Sunday evening it would lie somewhere between Savannah, Georgia, and Charleston, South Carolina. Neither expert would have predicted that by Sunday evening Donna would be over North Carolina, racing northeastward on a course likely to take her dangerously

near New York harbor by Monday afternoon. To be sure, if cross-examination had been pursued further, the experts might have conceded that their predictions could not be guaranteed beyond a short period, and that in consequence no one could say there was no risk whatever of Donna's approaching New York on Monday. But even if the operator should be charged with the results of so thorough an inquiry, an assumption that may well go beyond the bounds of realism, it was not unreasonable to fail to take special action on Friday afternoon.

In appraising the operator's conduct, it is necessary to resist the strong human temptation to review action by looking backward "with the wisdom born of the event," *Greene* v. *Sibley, Lindsay & Curr Co.*, 257 N. Y. 190, 192 (1931). Though the unlikelihood of the risk must be factored upward by its gravity, see Prosser, Torts 150-51 (3d ed. 1964), nothing the operator knew or could have known on Friday should have led it to believe that the risk of the concatenation of adverse circumstances which actually occurred was sufficiently appreciable to call for emergency precautions entailing substantial expense[6] The likelihood, indeed the fact, of recurvature of Donna was by no means synonymous with a significant risk of her hitting New York; only five hurricanes had seriously affected New York since 1938 and none since 1900 had come from the area where Donna was on Friday. And even the possibility of her striking New York did not portend arrival at a time coinciding with the normal high tide and passage at a point neither to the west of

[6] Labor on Saturday and Sunday carries a 50% extra charge, and the installation of extra pallets would have been useless if the risk did not materialize.

New York harbor nor so far to the east as the experts predicted even on Sunday night, but where she would produce maximum surge and wave action. The extraordinary circumstances that developed here were thus quite different from those in *Petition of Kinsman Transit Co.*, 338 F. 2d 708, 714 (2 Cir. 1964), cert. denied, 380 U. S. 944 (1965), where the conditions requiring the exercise of care "were of the very sort that had been occurring for years, although not quite in the same degree."

There remains only the claimants' contention that the district court should have followed *World Products, Inc.* v. *Central Freight Serv., Inc.*, 222 F. Supp. 849 (D. N. J. 1963), affirmed without further discussion of this issue, 342 F. 2d 290 (3 Cir. 1965), where a warehouseman on the Jersey side of the Hudson was held liable for flooding by Hurricane Donna. Although Judge Wyatt pointed to some differences of fact between the two cases, see 241 F. Supp. at 119, determination whether these or others were significant would require us to engage in a scrutiny of the record of *World Products* as thorough as we have made of the record here. In view of the firm conclusion we have reached after full consideration of this well tried and well argued case, we do not believe that effort would be rewarding.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of April one thousand nine hundred and sixty-six.

Present: HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

MAMIYE BROS., et al.,
Libellants-Appellants,

v.

BARBER STEAMSHIP LINES, INC., et al.,
Respondents-Appellants,

ATLANTIC STEVEDORING CO., INC., and
ATLANTIC PIERS CO., INC.,
Impleaded-Respondents-Appellees.

(and two other cases)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for

the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the appellees, Barber Steamship Lines, Inc., et al., and to the appellees, Atlantic Stevedoring Co., Inc., and ano.

A. DANIEL FUSARO
Clerk

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FILED
JUL 21 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966.

No. 333

MAMIYE BROS., ET AL.,
Petitioners,

against

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

against

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

GELMART KNITTING MILLS, INC., ET AL.,
Petitioners,

against

BARBER STEAMSHIP LINES, INC., ET AL.,
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against

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

ISAAC COHEN & SONS CORP., ET AL.,
Petitioners,

against

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

against

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

BRIEF OF RESPONDENT SHIPOWNERS A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, DAMPSKIBSAKTIESELSKABET DEN NORSKE AFRIKA OG AUSTRALIELINIE, WILHEMSIENS DAMPSKIPSAKTIESELSKAB, A/S TONSBERG IN OPPOSITION TO PETITION FOR CERTIORARI.

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Opinions Below.

The opinion of the United States District Court for the Southern District of New York, the Honorable Inzer B. Wyatt, U. S. D. J., presiding, dismissing the libels is reported at 241 F. Supp. 99, and is set forth at pages 194a-232a of petitioners' appendix, Volume I of certified record.

The opinion of the United States Court of Appeals for the Second Circuit affirming the dismissal of the libels has not yet been officially reported. It is set forth at pages App. 1-15 of the appendix to the petition.

Jurisdiction.

Petitioners assert the jurisdiction of this Court under 28 U. S. C. 1254 (1).

Question Presented.

The sole question presented by this petition is whether this Court should undertake to review the finding and conclusion of the District Court, unanimously affirmed by the Court of Appeals, that the terminal operator was not negligent in the care and custody of the cargo on its pier, and that the damage was caused solely by Hurricane Donna, an Act of God.

Statement of the Case.

The statement of facts set out at pages 2-7 of the petition is argumentative and fails to include many of the most important facts as found by the District Court, and we respectfully refer this Court to the opinions of District Judge Wyatt and Circuit Judge Friendly.

We suggest the following as a summary of the relevant facts:

Donna was the only hurricane ever to proceed into the Gulf of Mexico west of Florida and thereafter affect New York Harbor (226a). Only five hurricanes (not seven as stated at page 3 of the petition) had affected New York since 1938 (229a).

By a remarkable coincidence, Donna hit New York Harbor exactly at the peak of the astronomical tide, resulting in the highest recorded water level in New York's history (220a).

Donna's recurvature began at 7:00 A. M. on Friday, September 9. At 5:00 P. M. on that day, Donna was about one hundred miles southeast of Key West, had changed her direction slightly from west to northwest and had slowed to about 9 miles per hour. The National Hurricane Center at Miami at that time predicted no material change in intensity, speed or direction during the next 12 hours (216a-217a).

On September 9, all indications were that Donna would proceed into the Gulf of Mexico and strike the Gulf Coast (217a).

However, since the recurvature was sharper than anticipated, Donna's track was to the east of that predicted and on Saturday, September 10, and Sunday, September 11, she crossed Florida and proceeded into the Atlantic. Even then, the official forecasts were that although Donna would reach the latitude of New York on Monday, September 12, she would be moving to the northeast off the eastern end of Long Island (219a-220a). It was not until 10:00 P. M., Sunday night that the first of these forecasts was issued, and not until 11:55 P. M. that the New York Weather Bureau warned that high tides might result. Even

on Monday morning the prediction was that in New York Harbor tides would be only about 3 to 4 feet above normal.

The floor of Pier 5 is 10 feet above mean low water, one foot above the requirement of the Department of Marine and Aviation of the City of New York. The previous high water levels for New York Harbor were reached during the severe northeast storms of 1950 and 1953, 9.2 and 9.6 feet, respectively, above mean low water. These would not indicate that the water level was above the floor of Pier 5, but it is assumed that some water went over the pier as a result of wave action (224a; 230a).

Under the rules of the Waterfront Commission, labor for Saturday and Sunday had to be ordered by 3:00 P. M. on Friday (223a).

At no time on Friday did the weather forecasts give any intimation that Donna posed a threat to New York. On Friday, labor was ordered for resumption of normal operations on Monday (217a; 225a).

On Monday, that labor was immediately put to work in an effort to protect as much of the cargo as possible before the hurricane struck (223a).

ARGUMENT.

There Is No Conflict of Decision.

The sole reason urged by petitioners for granting the writ is an alleged conflict between the decision of the Court below and that of the United States Court of Appeals for the Third Circuit in *World Products, Inc.* v. *Central Freight Service, Inc.*, 342 F. 2d 290.

To be sure, both cases involved Hurricane Donna, but it is obvious that the factual situations were different. Furthermore, both Courts applied identical standards in

determining the issue of negligence. There is thus no conflict of decision, nor even a conflict of principle.

Petitioners go to great lengths to deprecate the factual distinctions pointed out by Judge Wyatt (231a). The first of these is that the pier in *World Products* was only 7.6 to 8.6 feet above mean low water, as opposed to Pier 5, Bush Terminal, which was 10 feet above mean low water. The significance of this difference is that it is clear from the District Court's opinion in *World Products* that the New Jersey pier floor was below the *level* of the six highest waters prior to Donna, commencing with the hurricane of 1938. Pier 5, of course, was not.

It follows, as Judge Wyatt recognized, that the New Jersey pier must have been *under water* on at least six occasions, as opposed to being affected by random wave action, as Pier 5 had been only twice, and the pier owner was quite properly held to be charged with knowledge of the fact that his pier was too low. It is noteworthy that if Donna had struck only an hour or so before or after the astronomical high tide, no damage would have occurred on Pier 5. Not so at the lower pier in New Jersey.

In addition, it appears in *World Products* that no effort of any kind was made to protect the goods, even after the Sunday night predictions that Donna would affect New York Harbor. It is undisputed that the labor on Pier 5 was put immediately to work on Monday morning doing everything possible to protect the cargo. This, of course, was the earliest any such measures could be taken after the predictions of the Weather Bureau the night before.

Both Judge Augelli in *World Products* and Judge Wyatt in the District Court below recognized and applied the same standard: that the pier operator should be excused if he can prove that the exercise of reasonable care would not have

foreseen and prevented the water damage from Donna. In *World Products* the defendant was held liable because he knew or should have known that his pier was too low and did nothing to protect the goods even after actual notice of Donna's approach. In the case at bar Pier 5 was more than high enough to meet the requirements for New York piers, and the operator did what it could after notice. Accordingly, the Court below quite properly found no negligence.

The Decision Below Is Clearly Correct.

Petitioners argue at page 17 of their petition that "one circuit or the other must be wrong". But they seem to assume that only the Second Circuit is wrong, despite the thorough and detailed opinions of the Courts below.

Until 10 P. M. Sunday, September 11, there was no warning that Donna might reach New York Harbor. On Friday, September 9, the National Hurricane Center had no concern that in sixty hours Donna would be in New York. As Judge Wyatt asked:

> "If this was the belief of the weather experts themselves, how possibly could the management of Pier 5 be found unreasonable in acting at the same time on the same belief?" (227a).

The Court of Appeals, unanimously affirming, succinctly pointed out:

> "In appraising the operator's conduct, it is necessary to resist the strong human temptation to review action by looking backward 'with the wisdom born of the event' [citation omitted]. Though the unlikelihood of the risk must be factored upward by its gravity, see Prosser, Torts 150-51 (3d ed.

1964), nothing the operator knew or could have known on Friday should have led it to believe that the risk of the concatenation of adverse circumstances which actually occurred was sufficiently appreciable to call for emergency precautions entailing substantial expense" (App. 14).

In the final analysis, this is a simple case of negligence, of interest only to the parties. The firm conclusion reached after full consideration by the Court below, that it was not unreasonable to fail to take special action on Friday afternoon, should clearly not be disturbed.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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BRIEF FOR RESPONDENTS ATLANTIC STEVEDORING CO., INC. AND ATLANTIC PIERS CO., INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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New Jersey Statutes Annotated 57:1-24 (Uniform Warehouse Receipts Act) 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 333

MAMIYE BROS., *et al.*,
Petitioners,
against
BARBER STEAMSHIP LINES, INC., *et al.*,
Respondents,
against
ATLANTIC STEVEDORING CO. INC., *et ano.*,
Respondents.

GELMART KNITTING MILLS, INC., *et al.*,
Petitioners,
against
BARBER STEAMSHIP LINES, INC., *et al.*,
Respondents.
against
ATLANTIC STEVEDORING CO. INC., *et ano.*,
Respondents.

ISAAC COHEN & SONS CORP., *et al.*,
Petitioners,
against
BARBER STEAMSHIP LINES, INC., *et al.*,
Respondents,
against
ATLANTIC STEVEDORING CO. INC., *et ano.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement

Petitioners, after exhaustive fact findings adverse to their position by both the United States District Court for the Southern District of New York and the United

States Court of Appeals for the Second Circuit, now petition this Court for certiorari. The Petitioners' contention of a conflict between the Courts of Appeal of the Second and Third Circuits is without legal foundation. Factually, the cases were in accord on common principles of law, differing only in the result because of the distinguishable law and findings of fact. Thus, in reality, the Petitioners approach this Court for a further review of the facts.

A simple analysis of the two cases, i.e., the consolidated case at bar, *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 241 F. Supp. 99, aff'd 360 F. 2d 774 (2d Cir. 1966) and *World Products Inc.* v. *Central Freight Service*, 222 F. Supp. 849, aff'd 342 F. 2d 290 (3rd Cir. 1965), readily demonstrates that there is no basis upon which Petitioners can, in fact, assert any conflict which should prompt this Court to consider the review of this case.

Law

World Products Inc. v. *Central Freight Service, supra,* was a civil diversity suit interpreting New Jersey's substantive law embodied in the Uniform Warehouse Receipts Act, N.J.S.A. 57:1-24. The consolidated case at bar, *Mamiye Bros.* v. *Barber Steamship Lines, Inc., supra,* was a suit in admiralty interpreting Federal Statutory Law embodied in the Carriage of Goods by Sea Act of 1936, 46 U.S.C. 1300-1315 and the Harter Act of 1893, 46 U.S.C. 190-196.

The *World Products* case and the case at bar both involved damage to property during the passage of Hurricane Donna on September 12, 1960 and in both cases the Circuit Courts of Appeal found the hurricane to be an Act of God.

The two Courts agreed upon the common principle of law involved. The correct proposition was clearly stated by the trial court in *World Products, supra* (page 851):

> "Although Hurricane Donna constituted an Act of God, the question still remains whether the storm was the sole cause of the damage to the plaintiff's goods."

The Court placed the burden on the defendant-bailee and found on the facts listed below that there was concurrent negligence.

In the case at bar, District Judge Wyatt* opined along the same line, "It would seem therefore to follow that the Act of God exception by definition cannot be established unless and until the carrier or bailee shows that the loss could not have been prevented by reasonable care and foresight." (18 App.)** The Court placed the burden on the respondent and found on the facts that there was no concurrent negligence.

Facts

The two Circuit Courts of Appeal affirmed the different conclusions as to liability reached by the District Judges essentially because of the different facts developed at the trials by the different attorneys. A brief comparison of the basic and crucial findings of fact make this apparent.

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* A copy of the District Judge's opinion is attached for the Court's convenience.

** Figures followed by "App." refer to pages of appendix to this brief.

In World Products	*In the Case at Bar*
222 F. Supp. at page 852	
"• • • that defendant took no precautions to protect the goods in the warehouse from flood damage either before or after it learned of the approaching hurricane • • •"	"On Monday morning, September 12, the labor ordered for that day showed up at 8 a. m. DST. There were 7 "gangs" of 23 men (including supervisor and 2 machine operators) and 70 "extra labor" or a total of 231 men. When they reported there were already high winds and heavy rain. The two ships refused to open hatches because of the rain. Some labor was receiving and delivering cargo. All other labor was put to work either placing extra pallets under the cargo tiers (to raise them higher) or nailing up doors which began to blow in during the morning." (34 App.)
"• • • that the use of additional dunnage by the defendant would have mitigated or avoided the loss, but was not attempted."	"Through these efforts, extra pallets were placed under about 3% to 5% of the cargo on the pier." (34 App.)
"• • • that defendant received adequate warning, a day or two before, that a hurricane was moving up the Atlantic Coast • • •"	"Until 10:00 P.M. DST on Sunday, September 11, there was no warning from the Weather Bureau that Donna might reach New York Harbor." (38 App.)

In World Products	*In the Case at Bar*
"* * * that as much as 70% of the first floor of the Edgewater warehouse was, at normal high tide, three to four feet above the water of the Hudson River * * *"	"The floor of the pier is 10 feet above mean low water. The City of New York requirement for piers in this respect is that they be 9 feet above mean low water." (32 App.)
"Upon considering all the evidence presented in this case, the Court finds as a fact that defendant was negligent * * *"	"The evidence establishes that the water damage from Hurricane Donna could not have been 'guarded against by the ordinary exertions of human skill and prudence.'" (36 App.)

ARGUMENT

The Petition for a Writ of Certiorari Should Be Denied for the Following Reasons

Although Petitioners have advanced a variety of arguments, all are premised on an illusory conflict between the Second and Third Circuit Courts of Appeal. The same arguments, based on the *World Products* case, were pressed in the District Court and the Court of Appeals and in both instances the illusion of conflict was destroyed by the decisions distinguishing the facts.

The Petitioners offer no substantial reason for the granting of a writ. They have not shown any conflict of opinion and what they really seek is a further third examination of the facts by this Court. Such a scrutiny of the records here involved has not been traditionally the function or the duty of this Court. Needless to say such a scrutiny would certainly be unrewarding.

The Petitioners have failed abjectly to articulate how any issue in this case is of such importance as to warrant

review by this Court. Where Petitioners argue about a disputed question of fact as we have here, the case falls within the rule enunciated in *Magnum Co.* v. *Coty,* 262 U. S. 159 (1923) where this Court held, at page 163:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

CONCLUSION

In view of the foregoing, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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BARBER STEAMSHIP LINES, INC., *et al.*,
Respondents,

against

ATLANTIC STEVEDORING CO. INC., *et ano.*,
Respondents.

Opinion of Trial Court

Appearances:

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ELI ELLIS, Esq.,
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ROBERT W. MULLEN, Esq.,
Of Counsel.

WYATT, District Judge.

These are three admiralty suits in personam, consolidated for trial by a pre-trial order of Judge Sugarman filed April 3, 1963 (Rule 13 of Admiralty Rules of this Court). They are to recover for damage caused to cargo

goods by high water which on September 12, 1960, flooded Pier 5 in Brooklyn where the goods were being held. The high water was associated with Hurricane Donna which passed New York Harbor on the date given. There is no dispute as to the fact of water damage nor as to the reason therefor.

After trial, the decision is that the libel in each of the three suits must be dismissed on the merits.

1. The three separate libels

a. The Mamiye Bros. suit (61 Ad. 779)

This libel was filed on June 28, 1961. The libelants, thirty-eight in number, are the consignees or owners or both of cargo items which were discharged to Pier 5, Bush Terminal, in Brooklyn prior to September 12, 1960 from M/V Toreador or, as to one of the cargo items, from M/V Turandot. Respondents are Barber Steamship Lines, Inc. ("Barber") and various other corporations, partnerships and individuals engaged as owners and operators of common carrier cargo vessels; some of the respondents owned or operated or both the Toreador and the Turandot. The libel alleged that when delivery of the cargo items was made to libelants by respondents (this delivery would be after September 12, 1960), such cargo items were not in the same good condition as when delivered to respondents for carriage but were damaged in the aggregate amount of $147,460.44 because they were "slack, wet, stained and deteriorated".

Opinion of Trial Court

In this suit, there are nine named respondents as follows:

Barber	A/S Tankfart I
Wilh. Wilhelmsen	A/S Tankfart IV
Dampskibsaktieselskabet	A/S Tankfart V
Den Norske Afrika-Og Australielinie Wilhelmsens Dampskibsaktieselskab	A/S Tankfart VI
A/S Tonsberg	

All have appeared in the suit.

The bills of lading for the Toreador shipments and the one Torandot shipment show, however, that the named respondents Barber and Wilh. Wilhelmsen had no ownership in either of the two vessels and were not parties to the bills of lading, the contracts of carriage. The libel would on this account be dismissed as against them in any event. The other respondents were owners of the carrying vessels, were parties to the contracts of carriage, and are proper parties respondent. Respondents brought into the suit—as impleaded respondents under Admiralty Rule 56 of the Supreme Court—the pier terminal operator (which happened to be also stevedore for respondents) and an affiliate of the pier operator, the lessee of Pier 5, respectively, Atlantic Stevedoring Co., Inc. and Atlantic Piers Co., Inc. These two last named corporations are subsidiaries of Barber. The petition to implead averred that respondents had a contract with Atlantic Stevedoring for stevedoring and terminal operation services; that in the contract Atlantic Stevedoring agreed to indemnify respondents for any liability imposed on respondents by reason of the negligence of Atlantic Stevedoring; that the

damage to the cargo items from the Toreador and Turandot occurred while such cargo items were in the custody of Atlantic Stevedoring on Pier 5; and that if there was any negligence, it was solely the negligence of Atlantic Stevedoring "in the maintenance of the pier and the care and custody of said shipments". The petition to implead further averred that Atlantic Piers was the lessee in possession of Pier 5 in Brooklyn; that when there was high water at Pier 5 on September 12, 1960, the cargo items were in the custody of Atlantic Piers as the lessee of Pier 5 and as bailee; and that if there was any negligence causing the damage by wetting to the cargo items it was solely the negligence of Atlantic Piers "in the maintenance of said pier and the care and custody of said shipments". Respondents ask, therefore, that if they (respondents) are held liable to libelants, there be recovery over in favor of respondents against the impleaded respondents.

b. The Gelmart Knitting Mills, Inc. suit (61 Ad. 807)

This libel was filed on July 5, 1961. The libelants, some twenty-one in number, are the shippers (consignors) or owners or both of cargo items which are alleged to have been delivered to respondents at Pier 5, Bush Terminal, in Brooklyn, for shipment to foreign ports by respondents on vessels, the M/V Turandot, the M/V Tatra and the S/S Queensville. Respondents are Barber and various other corporations, partnerships, and individuals engaged as owners and operators of common carrier cargo vessels; some of the respondents owned or operated or both the Turandot, Tatra, and Queensville. Tle libel alleged that after delivery to respondents and while the cargo items

were on Pier 5 in their custody the cargo "became damaged by water" to the extent of $32,768.83.

In this suit, there are 16 named respondents as follows:

Barber	A/S Tankfart V
American-West African Line, Inc.	A/S Tankfart VI
D/S A/S Den Norse Africa-Og Australielinie (there are many variants in the spelling of this word in the papers; this spelling is used uniformly because it is employed in the printed bill of lading.)	Barber Mediterranean Line, Inc.
Wilh. Wilhelmsen	Barber Line
Wilhelmsens D/S A/S	A. F. Klaveness & Co. A/S
A/S Tonsberg	A/S Solstad
A/S Tankfart I	D/S A/S International
A/S Tankfart IV	James Denny

No citation was ever served on respondent James Denny nor did he ever appear. All the other respondents have appeared. The bills of lading and dock receipts show that the several shipments (except for items 19, 20 and 23 of Schedule A to the libel) were delivered to Pier 5 for shipment out by Turandot and Tatra. There is no evidence in the record of delivery of anything for shipment out by Queensville. There are dock receipts (signed by the receiving clerk of the pier operator) covering items 19, 20 and 23 of Schedule A to the Gelmart libel;

these dock receipts are marked "Hold on Dock" but without the name of any ship; as to items 19 and 20 the receipts indicate in typewriting that the shipment was to go by "Barber Line" or "Barber Steamship Line" and as to item 23 the dock receipt is unsigned but is on a printed form of "Barber Line". Respondents appear to make nothing of these differences and for present purposes they are ignored.

The following respondents were owners of the Turandot and Tatra and as such parties to the contract of carriage and to receipt of the cargo items by their agents at Pier 5:

Dampskibsaktieselskabet Den Norske Africa-Og Australielinie

Wilhelmsens Dampskibsakieselskab

A/S Tonsberg

A/S Tankfart I

A/S Tankfart IV

A/S Tankfart V

A/S Tankfart VI

These are proper parties respondent. As to the other named respondents in this suit, the libel would be dismissed as to them in any event unless before entry of the decree it could be shown that other respondents are proper because of the facts concerning items 19, 20 and 23 of Schedule A annexed to the libel. On substantially the same averments as in the first suit, respondents by petition brought into the second suit—as impleaded respondents under Admiralty Rule 56 of the Supreme Court

—Atlantic Stevedoring and Atlantic Piers; recovery over was asked on the same basis.

c. The Isaac B. Cohen Sons Corp. suit (61 Ad. 1096)

The libel in this suit was filed on September 12, 1961. Ten of the libelants are the consignees or owners or both of cargo items which were discharged to Pier 5 in Brooklyn prior to September 12, 1960 from the Toreador, the Turandot and the Talleyrand. Twelve of the libelants are the shippers (consignors) or owners or both of cargo items which are alleged to have been delivered to respondents at Pier 5 in Brooklyn for shipment to foreign ports by respondents on the motor vessels Tatra, Turandot and Corneville. Respondents are Barber and various other corporations, partnerships and individuals engaged as owners and operators of common carrier cargo vessels; some of the respondents owned or operated or both the Toreador, the Turandot, the Talleyrand and the Tatra.

The Corneville, according to a bill of lading in evidence (Ex. 11; item 17 of Schedule B to the libel) and according to advice from counsel for respondents, was owned by S/A Sangstad—not a party to any of the suits. There could thus have been no decree in any event as to the deliveries for shipment by Corneville (items 17 and 18 of Schedule B to the libel).

As to the cargo discharged to Pier 5 from Toreador, Turandot and Talleyrand, the libel alleged that when later delivered to the ten libelants concerned, it was not in the same good condition as when delivered to respondents but was damaged in the aggregate amount of $17,171.51 because it was "slack, wet, stained and deteriorated". As to the cargo items delivered by the twelve libelants to re-

spondents for shipment to foreign ports, the libel alleged that after delivery to respondents and while the cargo items were in their custody, the cargo "became damaged by water" to the extent of $22,283.58.

In this suit, there are the same 16 named respondents as in the Gelmart suit (61 Ad. 807). As already noted, respondent James Denny was never served with citation and never appeared. All the other respondents have appeared. The bills of lading show that the vessels from which the inbound shipments were discharged (Toreador, Turandot and Talleyrand) and the vessels to carry out the outbound shipments delivered to Pier 5 (Turandot and Tatra) were owned by the following respondents:

Dampskibsaktieselkabet Den Norske Africa-Og Australielinie

Wilhelmsens Dampskibsaktieselskab

A/S Tonsberg

A/S Tankfart I

A/S Tankfart IV

A/S Tankfart V

A/S Tankfart VI

These are proper parties respondent. As to the other named respondents in this suit, the libel would be dismissed as to them in any event. There are averments in the libel (items 17 and 18 of Schedule B to the libel) respecting deliveries of cargo items to Pier 5 for shipment by Corneville. The owner of this vessel (as already noted) was

S/A Sangstad, not a respondent, and therefore no relief could be given here as to these items in any event.

On substantially the same averments as in the first two suits, respondents by petition brought into the third suit—as impleaded respondents under Admiralty Rule 56 of the Supreme Court—Atlantic Stevedoring and Atlantic Piers; recovery over was asked on the same basis.

2. The duty of respondents to the cargo

It appears without dispute that the cargo items in suit were damaged to an extent not necessary now to determine while on Pier 5 in Brooklyn; the damage was caused by high water at Pier 5 on September 12, 1960 when Hurricane Donna struck the New York area.

It is not easy to determine under what law the duty of the carrier to the cargo is to be determined: the Carriage of Goods By Sea Act of 1936 (46 U.S.C. §§1300-1315; "Cogsa"), or the Harter Act of 1893 (46 U.S.C. §§190-196), or general maritime law.

Cogsa does not apply of its own force because it is applicable only "from the time when the goods are loaded on to the time when they are discharged from the ship". 46 U.S.C. §1301(e).

The Harter Act is applicable while the goods are in the custody of the carrier before loading and also "between the discharge of cargo from the vessel and its proper delivery". *Caterpillar Overseas S.A.* v. *S.S. Expeditor*, 318 F.2d 720, 723 (2d Cir. 1963). And the same opinion points out that normally "proper delivery" means delivery to a fit and customary wharf (318 F.2d at 724). The discharge of the inbound cargo to Pier 5 was delivery to a fit and customary wharf. The goods last discharged were

so discharged on Friday, September 9, 1960. At that time the wharf was fit and customary. The situation is different from that in *Lavatino Company, Inc.* v. *American President Lines Ltd.*, 337 F.2d 729 (2d Cir. 1964), where chestnuts were discharged to an unheated pier *at a time* when it was so cold that chestnuts were likely to freeze.

Absent valid contract stipulations, therefore it would appear that the duty to the inbound goods should be found in general maritime law and the duty to the outbound goods in the Harter Act.

In the suits at bar, however, there were relevant contract stipulations.

The bills of lading in respect of all the inbound shipments contained the following provisions:

> "This bill of lading shall be governed by, have effect subject to and be construed in accordance with the statutory and other laws of the United States of America, including the Carriage of Goods by Sea Act of the United States, approved April 16, 1936 and shall have effect subject to the Carriage of Goods By Sea Act * * *"
>
> "The Carrier shall not be liable as carrier prior to the loading of the goods on board the vessel, or after the goods have left the vessels tackle on unloading. While the goods are in its actual custody before they are loaded on the vessel and after they are discharged therefrom either at the port of destination or transshipment or elsewhere, the liability of the Carrier shall be merely that of a bailee and during such periods the Carrier shall be entitled to all the exemptions from liability contained in

> Section 4 of the U.S. Carriage of Goods by Sea Act of 1936 as well as and in addition to all other exemptions and limitations set forth in this Bill of Lading."
>
> "The provisions of the Carriage of Goods By Sea Act of the United States approved April 1936, shall, where applicable, apply to and govern the rights and obligations of the Carrier and the goods owner before the goods are loaded on and after they are discharged from the vessel and throughout the entire time the goods are in the custody of the Carrier."

These provisions are contradictory, confusing and ambiguous. They purport to incorporate Cogsa into the contract, which may validly be done so long as the result is not to diminish the liability of the carrier. 46 U.S.C. § 1303(8); Gilmore and Black, The Law of Admiralty, page 125. At the same time they provide that in the relevant period the "Carrier shall not be liable as carrier"—wholly inconsistent with Cogsa—but "merely" as a "baillee" followed immediately by a statement that the carrier is entitled to the benefit of Section 4 of Cogsa. Finally Cogsa is expressly made applicable "where applicable" to the "rights and obligations . . . before the goods are loaded on and after they are discharged from the vessel" etc.

Where the problem is one of construction of ambiguous language in a bill of lading, it seems better to adopt that construction which is most favorable to the cargo, this because the bill of lading is prepared by the carrier. *Compania de Navigacion La Flecha* v. *Brauer,* 168 U.S. 104, 118 (1897); *The Caledonia,* 157 U.S. 124, 137 (1895);

Pannell v. *S.S. American Flyer,* 157 F.Supp. 422, 429 (S.D.N.Y. 1957), modified on other grounds 263 F.2d 497 (2d Cir. 1959), cert. denied 359 U.S. 1013 (1959). See *The Monrosa* v. *Carbon Black, Inc.,* 359 U.S. 180, 183 (1959).

I conclude, therefore, that as to the inbound goods discharged to the pier, Cogsa applies because made a part of the contract.

As to the outbound shipments, the relevant bills of lading contained the following provision:

> "1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (except as may be otherwise specifically provided herein) shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in custody of the Carrier * * *"

Those words seem entirely clear to incorporate Cogsa into the bills of lading. Cogsa thus applies to all the outbound goods on Pier 5 because Cogsa was made a part of the contracts.

By agreement of the parties, therefore, respondents as carriers owed a duty "properly and carefully" to "handle, stow, carry, keep, care for, and discharge" the cargo. 46 U.S.C. § 1303(2). In other words, respondents are liable for damage to the cargo caused by their negligence.

The result would be the same under general maritime law. *Propeller Niagara* v. *Cordes,* 62 U.S. 7, 23 (1859); *Clark* v. *Barnwell,* 53 U.S. 272, 280 (1851); Gilmore and Black, cited above, at 120.

And the effect of the Harter Act, if applicable, would simply be to leave in effect the general maritime law duty and to make "null and void" any provision "relieving from liability for negligence". 46 U.S.C. § 190.

Respondents point to the provision in Cogsa relieving the carrier from responsibility for damage resulting from "Act of God". 46 U.S.C. § 1304(2)(d).

But this does not take away the issue of negligence, because, as will be seen, the Act of God exception is not available to the carrier if the carrier was negligent in failing to guard against the natural event claimed to be the Act of God.

The carriers are responsible, of course, for any negligence of the impleaded respondents, Atlantic Stevedoring and Atlantic Piers, one or both of which had actual custody of the goods. A carrier is liable for any negligence of those in whose hands it has placed the goods. *David Crystal, Inc.* v. *Cunard S.S. Co.,* 339 F. 2d 295, 298 (2d Cir. 1964).

Thus far, the parties appear to be in substantial agreement with the analysis here made.

3. The Act of God exception and the burden of persuasion on the issue of negligence

It must next be determined whether the burden of persuasion as to the issue of negligence rests on libelants or on respondents.

The matter is not without difficulty.

Respondents have pleaded, as an affirmative defense, in substance that Hurricane Donna was an "Act of God". These precise words are not used in the answers but there are general expressions (". . . a cause or causes for which neither the Carriers nor the vessels are liable . . .") which are sufficient to raise the point, made more explicit in the brief for respondents (pp. 17-24).

The Act of God exception to liability of the carrier or bailee exists under general maritime law (Carver, Carriage of Goods By Sea (10th ed.) 10-13) and under Cogsa (46 U.S.C. § 1304(d)).

The definition of "Act of God" in the present context seems generally to include, as an essential element, that the damage from the natural event could not have been prevented by the exercise of reasonable care by the carrier or bailee.

In *The Majestic,* 166 U.S. 375 (1897) the Court referred with approval to the definition of Chancellor Kent, as follows (386):

> "The act of God, said Chancellor Kent (2 Kent, Comm. p. 597), means 'inevitable accident, without the intervention of man and public enemies'; and again (volume 3, p. 216), that 'perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence.' A *'casus fortuitus'* was defined in the civil law to be, *'quod dammo fatali contingit, cuivis diligentissimo possit contingere.'* It is a 'loss happening in spite of all human effort and sagacity.' The words 'perils of the sea' may indeed have grown to have a

broader signification than 'the act of God' but that is unimportant here."

Judge McGohey appears to have assumed that an "act of God" is not only one which causes damage but one as to which reasonable precautions could not have prevented damage. In *Moran Transportation Corp.* v. *N. Y. Trap Rock Corp.,* 194 F.Supp. 599, 602 (S.D.N.Y. 1961) Judge McGohey said:

> "Hurricane Hazel was not an Act of God. At Tomkins Cove it was neither so sudden nor so violent that Trap Rock's experienced men who had not less than twenty-four hours' warning could not have taken precautions to guard against it."

The definition quoted by Judge Inch with approval in *The Empress of France,* 49 F.2d 291 (E.D.N.Y. 1930) is this:

> "By 'act of God' is meant some inevitable accident which cannot be prevented by human care, skill, or foresight, but results from natural causes, such as lightning, tempests, floods, and inundations."

The exception for "perils of the sea" is very like in principle to that for an act of God. The former has been defined in *The Giulia,* 218 F. 744, 746 (2 Cir. 1914) as follows:

> "Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."

This definition has been cited with approval. *R. T. Jones Lumber Co.* v. *Roen S.S. Co.,* 270 F.2d 456 (2d Cir. 1959). The significance for present purposes is in that part of the definition which makes an essential element of the exception that the perils "cannot be guarded against by the ordinary exertions of human skill and prudence".

Gilmore and Black, cited above, first deal with the "perils of the sea" exception which they define (at 140) as follows:

> ". . . a fortuitous action of the elements at sea, of such force as to overcome the strength of the well-found ship or the usual precautions of good seamanship. Thus, in a sense, the absence of negligence as a concurring cause may be said to enter into the very definition of a sea peril, so that, in order to establish an exception under this clause, the ship would have to establish freedom from negligence."

They then turn to act of God and refer (at 141) to the language of an old English case, *Nugent* v. *Smith,* [1876] 1 C.P.D. 423, 444, defining act of God as follows:

> ". . . a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him."

The authors then note (at 141-42): ". . . absence of human negligence or fault as a concurring cause is a part of the definition of the 'Act of God'".

The first definition of "Act of God" given in 1 Bouvier's Law Dictionary Rawle's Third Revision (8th Rawle ed.) p. 116 is:

> "Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected."

And the following statement is from Carver, Carriage of Goods By Sea (10th ed.) 10:

> "The meaning of 'act of God' in this relation has given rise to much discussion and difference of opinion. The result of this seems to be that to enable us to describe a casualty as arising from an act of God it must have two essential features. First, it must have occurred independently of human action; man must have been purely passive. Secondly, it must have been an event which the shipowner could not have avoided, or guarded against, by any means which he could reasonably be expected to use."

It seems accepted on all sides that a shipper makes out a prima facie case against a carrier or bailee by showing merely that the goods were not turned out in as good condition as when delivered by or for the shipper. The carrier or bailee must then bring the loss within an "exception" to his liability established by law or contract. Gilmore and Black, cited above, at 162-163.

It would seem therefore to follow that the Act of God exception by definition cannot be established unless and until the carrier or bailee shows that the loss could not

have been prevented by reasonable care and foresight. This logic would mean that in the case at bar the burden is on respondents to show the exercise by them of reasonable care or, to put it another way, that the damage could not have been prevented by the exercise of reasonable care.

The Majestic, above, is authority for this view. The Court approved the award of damages against a ship where luggage of passengers was wet by water and where the ship pleaded act of God. The Court said (166 U.S. at 386, 17 S. Ct. at 602):

> ". . . the question still remains, on the doctrine of implied exceptions, whether the injury here was by the act of God, for which the company was not liable. The burden in this respect is on the carrier."

The burden meant that the carrier had to show that the damage could not have been prevented by reasonable care. The Court said (166 U.S. at 388, 17 S. Ct. at 603):

> "In our opinion the steamship company failed to show that the accident was one which could not have been prevented by human effort, sagacity and care . . ."

Citing *The Majestic* as authority and referring to the common law rule, Carver, cited above, has this to say in discussing the act of God exception (at 12):

> "What is needful is that the causes of the event shall have been so far beyond what could reasonably be foreseen, or, if they might have been foreseen, shall have been so far irresistible that no

foresight or endeavour of man, reasonably to be expected, would have prevented their operation.

"It is not enough for the shipowner to show that the loss arose from natural, as distinguished from human, causes, and to leave it to the other side to show that there was some want of precaution or care on his part; he must himself show affirmatively that the causes were such that no reasonable amount of precaution and care would have enabled him to avoid or guard against them."

There is authority in England that the burden of proof as to negligence in respect of all the Cogsa exceptions (46 U.S.C. § 1304(2)(a) through (g)) is on the ship (*Gosse Millard* v. *Canadian Government Merchant Marine*, [1927] 2 K.B. 432, 436-437). The Act of God exception was not specifically mentioned.

In discussing the effect of Cogsa on burden of proof, Carver, above, does not treat specifically the Act of God exception but, criticizing the *Gosse Millard* decision, seems to say that the cargo should have the burden of proof as to negligence in connection with nearly all the Cosga exceptions. Carver, cited above, at 185-186.

Gilmore and Black, cited above, seem to state clearly that under Cogsa the carrier has the burden of persuasion as to negligence in an Act of God situation. They say (at 163, emphasis supplied):

"Once the damage is established, the carrier, it would seem has two main lines of possible escape. He may take up the burden of establishing that the loss falls within 4(2) (a) to (p) [which includes Act of God as (d)]. If he does this success-

> fully, then either (as in 4(2) (a)) he is exonerated regardless of his negligence or (as in 4(2) (c) [perils of the sea; analogous to Act of God]) *he will, in effect, already have established his own freedom from negligence as a part of the process of bringing himself under the exception;* or, if the exception he has brought himself under is one to which his own contributing fault would disentitle him, the burden will shift to the shipper to prove the carrier's negligence or other fault."

There are, on the other hand, old decisions which indicate that when Act of God is pleaded and the natural event shown, the burden is on the shipper to prove negligence in failing to take precautions. Examples are *Clark* v. *Barnwell,* 12 How. 272, 280, 53 U.S. 272, 13 L. Ed. 985 (1851); Taney, C.J. and Wayne, J. dissenting, *N. & C. Railroad Co.* v. *Reeves,* 77 U.S. 176, 10 Wall. 176, 190, 19 L. Ed. 909 (1869). Judge Friendly has in effect put the first of these cases to one side on its facts (*Lekas & Drivas, Inc.* v. *Goulandris,* 306 F. 2d 426, 431; 2d Cir. 1962):

> "The respondents in Clark v. Barnwell had not only established a peril of the sea as a cause but had negated all others; libelants in that case not merely failed to sustain a burden, but no evidence of negligence 'is found in the record,' 12 How. 283, 13 L.Ed. 985."

The authority of the two old Supreme Court cases has been virtually destroyed by later decisions.

Schnell v. *The Vallescura,* 293 U.S. 296 55 S. Ct. 194, 79 L. Ed. 373 (1934) is important in this connection.

Opinion of Trial Court

Onions were delivered on board ship in Spain in good condition but were turned out in New York "damaged by decay". The ship pleaded no liability because there was an exception relieving the ship of liability for decay and further because the damage was caused by "perils of the sea", a defense very like that of Act of God. The evidence indicated that damage to the onions was caused (a) by closing hatches in heavy weather (a peril of the sea) and (b) by keeping the hatches closed in fair weather (negligence). This Court concluded that since the ship had failed to prove (and could not prove) how much of the damage was due to the peril of the sea, the cargo could recover for the full damage (D. C. 43 F.2d 247). The Court of Appeals reversed (2 Cir., 70 F. 2d 261) because all the damage was from decay and thus prima facie shown to be within a specific exception for decay; therefore the cargo had the burden of proof to show that the exception was not conclusively established by showing that the decay in whole or in part was caused by negligence of the ship. Since the cargo could not show what part of the damage was due to negligence, the ship was left "excused" (70 F. 2d at 263). The Supreme Court unanimously reversed, holding that the burden was upon the carrier to bring himself within an exception; that this was true with respect to exceptions implied in law such as "act of God or the public enemy" (293 U.S. at 304, 55 S. Ct. at 196); that it was also true in respect of exceptions agreed upon in the bill of lading; that the burden is placed on the carrier because he is a "bailee" who has "an extraordinary duty" and usually has peculiar knowledge of those facts relied upon to relieve him of the duty; and that the law "annexes a condition" to the exceptions "that they shall relieve the carrier from liability for loss from an excepted cause only if in the course of the voyage he has

used due care to guard against it" (293 U.S. at 304, 55 S. Ct. at 196). The Court took note of such cases as *Clark* v. *Barnwell,* above, and *Railroad Co.* v. *Reeves,* above, and in this connection said (293 U.S. at 304-305, 55 S. Ct. at 196):

> "It is commonly said that when the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it. Such we may assume the rule to be, at least to the extent of requiring the shipper to give evidence of negligence where the carrier has sustained the burden of showing that the immediate cause of the loss or injury is an excepted peril."

On its face, this language would not affect the analysis here made because, by definition, the carrier does not establish the "excepted cause" of act of God unless freedom from negligence in "failing to guard against it" is itself shown.

But, assuming the quoted language to refer to negligence with reference to an act of God exception, the Supreme Court appears to be limiting the old decisions to this effect: if a prima facie case of due care is made out by the ship, then the burden of *going forward* with evidence of negligence is on the shipper and (inferentially) the burden of *persuasion* is left on the ship. Cf. *Alliance Assurance Co.* v. *United States,* 252 F. 2d 529, 535 (2d Cir. 1958).

A note appearing in the Texas Law Review discusses *The Vallescura* and other cases and says:

". . . if the burden of the ship is to show that the *cause* of the injury was, for instance, a peril of the sea, it cannot be satisfied without a corresponding exclusion of any other cause, including that of negligence.

"If this is the case, under the causal type exception, can there really be a shifting burden? It would seem that if the ship actually carried the burden laid on her in *Clark* v. *Barnwell, i.e.,* showed the damage to have been in actuality the result of an excepted cause, such showing would, ipso facto, leave the shipper without a case.

"To cloud such an analysis, however, two further problems arise. One is the question of *separate* concurring causes, each of which was responsible for part of the damage. This will be discussed later. Another is the theory that although the loss be caused by a peril of the sea, the shipper may still recover by showing that the use of diligence on the part of the ship would have avoided the effects of the peril. It would seem however, that analytically, an attempt by the cargo to make such a showing would be in the nature of a rebuttal of the causation element of the ship's primary burden —if (under the bill of lading exception), that burden contains a causation element. The diverse effects of 'cause' and 'effect' type exceptions appear. As before stated, in the 'cause' type case, the question of proximate cause of the damage must be put in issue first by the ship, as part of its case for the excepted cause. Therefore, it would seem that an attempt by the shipper to show the efficiency of another cause

> (negligence) must be in the nature of a rebuttal and of meeting the requirement that he 'go forward' with some showing of negligence, in order to prevent an instructed verdict."
>
> Note, Cargo Damage at Sea: *The Ship's Liability,* 27 Tex. L. Rev. 525, 533 (1949).

The length of this discussion may well have been unnecessary in view of very plain language in a recent Supreme Court decision, *Mo. Pac. R.R. Co.* v. *Elmore & Stahl,* 377 U.S. 134, 84 S. Ct. 1142, 12 L. Ed. 2d 194, rehearing denied 377 U.S. 984, 84 S. Ct. 1880, 12 L. Ed. 2d 752 (1964), quoting and citing *The Vallescura.* The Supreme Court said (377 U.S. at 138, 84 S. Ct. at 1145):

> "Accordingly, under federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability."

The case dealt with a railway carrier but, unless the provisions of Cogsa can be said to be to the contrary (which seems not possible), the language seems applicable to maritime cargo claims.

For the reasons indicated, the conclusion is that respondents have the burden of persuasion that damage from Hurricane Donna could not have been guarded against by reasonable care on their part.

4. Hurricane Donna and its effect

Opinion of Trial Court

A hurricane is a tropical cyclone with winds of more than 75 miles per hour ("mph") which move counterclockwise in a circular fashion around a center area, or "eye", where there is little wind or dead calm. If a tropical cyclone has winds of less than 75 mph it is usually called a "tropical storm". A hurricane is normally accompanied by heavy rain.

The effect of a storm or hurricane over water is to raise the level of the water above the level of the normal, astronomical, predicted tide. The difference between the observed water level and the astronomical tide level is "storm surge" or "hurricane surge".

The United States Weather Bureau has local offices over the country, including one in New York City; it also has in Miami a National Hurricane Center, which is a specialized research and warning service.

During the course of a hurricane, National Hurricane Center through Miami Weather Bureau issues every six hours a numbered "advisory" or report of information. These are issued at 5 and at 11, before noon and after noon. Bulletins are issued in between; for an emergency or if there is a radical change a special advisory is issued at any time.

Based on each advisory, the Center forecasts where the hurricane will be 24 hours later; these forecast positions are used within the Bureau and possibly by the Air Force and Navy but apparently they are not included in the advisory.

Local offices of the Weather Bureau receive the hurricane advisories and issue such local bulletins as seem indicated by local conditions.

Opinion of Trial Court

Hurricane Donna was first observed on September 2, 1960 several hundred miles east of Puerto Rico moving westward from the direction of the Cape Verde Islands. In the first advisory (from San Juan) Donna was described as a "severe hurricane". It then moved west northwest then west, passing north of Puerto Rico and Cuba.

During September 9 (Friday) Donna moved at 10-12 mph north of Cuba toward the Florida keys. At 5 p.m. Eastern Standard Time ("EST") it was about a hundred miles southeast of Key West, had slowed somewhat and was moving at 9 mph toward the west northwest. The 5 p.m. advisory stated that "no material change is expected in intensity speed or direction during the next 12 hours".

At 11 p.m. EST on September 9, the center of Donna was 35 miles off the Florida keys moving northwest at 7 mph. The 11 p.m. advisory stated: "Little change in intensity and speed is indicated during the next 12 hours and the direction of movement will likely change to slightly more northerly".

According to a report by the Army Engineers: "All indications pointed to the storm entering and continuing into the Gulf of Mexico".

During September 9, the location of Donna at the hours indicated on September 10 were forecast by the Weather Bureau to be as follows:

5 a.m.—slightly west of Key West

11 a.m.—in Gulf of Mexico about 90 miles west of Fort Myers

5 p.m.—in Gulf of Mexico about 60 to 70 miles west of Tampa

11 p.m.—about on the Florida west coast

These forecast locations were farther to the west than the actual track of Donna on September 10. The chief forecaster of the National Hurricane Center testified that this was because "recurvature was sharper than anticipated".

Recurvature is a change in the direction of a hurricane from a west or northwest movement to a north or northeast movement. It is a consequence of a meeting of the west or northwest moving hurricane with southerly winds or the mid latitude westerlies (winds which carry the jet stream). The effect is to turn the westerly slow moving hurricane to the north and northeast. Generally a hurricane moving from the direction of the Cape Verde Islands is pushed west by the trade winds south of a line of high pressure area extending west from the Azores and called the "Bermuda High". At the western end of the Bermuda High, the hurricanes often meet the southerly winds or mid latitude west winds and are turned, or recurved, toward the north or northeast. The length of the Bermuda High varies. When it is long and extends through Bermuda over a part of the United States, the hurricane will go west into the Gulf of Mexico and any recurvature will naturally occur out in the Gulf of Mexico and at a more westerly longitude than when the Bermuda High is shorter and does not extend to or over any part of the United States; in the latter case any recurvature will normally occur off the east coast of the United States.

The Bermuda High recedes from the west and shortens progressively from August through the late fall months, tending to bring it about that any recurvature of a hurricane in September would be at a more easterly longitude than in August. Recurvature in September while not invariable is more frequent than not.

When recurvature occurs, the forward speed of the hurricane increases; moving west before the trade winds the speed averages 12 mph; after recurvature the speed may be two, three or five times that rate.

It is most difficult to forecast the point of recurvature, and apparently also the extent, that is, how sharp will be the curve around to the northeast; forecast of the path is most difficult during the period of recurvature; and it is more difficult to forecast speed and direction after recurvature than before.

As already noted, the actual track of Donna on September 10 was not as far west as had been forecast; at 11 p.m. EST on September 10 (Saturday), instead of being on the Florida west coast (as predicted) Donna was near Lakeland, some 50 miles to the east, moving at about 12 mph.

On Sunday, September 11, Donna continued to move in a northeasterly direction and with increasing speed as shown by its speed at the following hours (EST) on September 11:

5 a.m.	14
11 a.m.	19
5 p.m.	23
9 p.m.	35
11 p.m.	40

Beginning at 5 a.m. on September 11, the Weather Bureau forecast positions for Donna for the following day were shifted well to the east of the forecast track up to that time. As it turned out, the forecast positions were to the east of the actual track of Donna on September 12 by some 180 or 200 nautical miles (about 206 to 228 statute miles). If Donna had taken the course forecast by the Weather Bureau as her course from 5 a.m. September 12 through 11 p.m. September 12, she would have passed at least 200 statute miles east of the eastern tip of Long Island and there would have been no pier flooding in New York Harbor.

The first hurricane warning issued by the Weather Bureau for an area including New York City was at 9 p.m. EST on Sunday, September 11. This was a special advisory (numbered 38) headed: "hurricane emergency warnings 9 p.m."

New York at that period of the year was on a time one hour faster than at other periods. New York Construction Law § 52. In New York (and doubtless elsewhere) the faster time is usually called Daylight Saving Time ("DST") and the slower time Eastern Standard Time ("EST").

The first hurricane warning from the Weather Bureau to New York about Donna was thus issued at 10 p.m. DST on Sunday, September 11, by the Miami Weather Bureau; this was repeated to news media in New York by the Weather Bureau office here. This warning stated among other things that on Monday morning, September 12, the

center of Donna would be "a short distance off the East end of Long Island". At 11:55 p.m. local time Sunday, September 11, the New York Weather Bureau office issued a local bulletin, warning, among other things, that tides may run from five to eight feet above normal on Monday morning.

Donna did hit New York Harbor on Monday, September 12. As it approached here, the eye elongated to an east-west distance of about 100 miles. There were high winds and heavy rains from at least 8 a.m. DST that morning. The eye passed over Long Island between 2:30 p.m. and 3:30 p.m. DST. The western edge of the eye brushed the New Jersey shore, the eastern edge was about 100 miles east on Long Island, and the middle of the eye was thus in the western part of Suffolk County.

During the passage of Donna and at 3:18 p.m. DST on September 12, the water level in New York Harbor rose to the highest level in history, despite the fact that the storm surge of Donna was not the highest. One of the chief reasons for this was that the passage of Donna coincided with the peak of the predicted astronomical tide. Wave action at times brought the water level higher than the statistically recorded levels; from pictures taken during the hurricane, wave heights in New York Harbor were estimated by Army Engineers at about 5 feet.

The comparison between the water levels of Donna and the four highest levels during previous hurricanes or storms, for two points in New York Harbor, are as follows:

Heights in Feet Above Mean Low Water

	The Battery	Fort Hamilton
Donna	10.7	10.9
February 19, 1960	8.4	9.2
November 7, 1953	9.7	10.0
November 25, 1950	9.2	9.8
September 14, 1944	8.3	9.0

The foregoing figures are taken from the report of the Army Engineers (Ex. AE) for Donna and for November 7, 1953, with an adjustment of 2 feet 3 inches to translate feet above mean sea level to feet above mean low water. The other figures are taken from Exhibits 9 and 10.

During the passage of Donna, the water level in New York Harbor rose rapidly and fell even more rapidly.

5. Pier 5 and Donna

Pier 5 in Brooklyn, where the goods in suit were located when water damaged, is in a row of piers extending into Bay Ridge Channel out from the Bush Terminal Warehouses in Brooklyn. Pier 5 is about midway between The Battery and Fort Hamilton.

Pier 5 is 1310 feet long and 150 feet wide. The floor of the pier is 10 feet above mean low water. The City of New York requirement for piers in this respect is that they be 9 feet above mean low water. The total floor area for cargo of Pier 5, including track area, is 183,500 square feet. The pier is covered. An asphalt roadway, 50 to 60 feet wide, runs down the center. Cargo is stored on either side of the roadway and partially in the roadway, about 7 or 8 feet on each side. Some sections of the pier are kept clear so as to enable loading and unloading to

be done to and from the hatches in ships alongside. There was an isolated section at the water end for gear and pallets, there was office space midway the length of the pier and also at the end, and there was an area for keeping the small fork lift trucks used to handle cargo ("hi-los"). The pier would support cargo weight of about 4000 tons. Four ships could tie up alongside the pier at any one time.

As noted earlier, Atlantic Stevedoring was the operator of Pier 5 under a contract with respondents.

The Toreador arrived at the pier, directly from the Panama Canal, on September 7 to discharge only, completed discharge of cargo about 6 or 7 p.m. on Friday, September 9, and sailed the same evening for Boston. The weather on her trip to Boston was good.

The Turandot had arrived at the pier about September 8 to load only and her loading began that day or on Friday, September 9. The Tatra arrived at the pier to load only on Saturday, September 10, or Sunday, September 11; her loading was to commence on Monday, September 12.

At the close of business on Friday, September 9, about 80% of the space on Pier 5 was occupied by cargo; this cargo was about 2500 tons in weight. Of the cargo there, about 75% was stacked in tiers about 10 to 12 feet high resting on pallets. A pallet is a wooden platform or tray about six inches high designed for use in handling cargo with a fork lift truck ("hi-lo"). The purpose of the pallet is not to raise cargo from the pier floor but to enable to fork lift truck to handle the cargo by lifting the supporting pallet. The cargo not on pallets was of a nature not usually stacked in tiers, such as long rugs, graphite and the like.

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The labor on the pier had to be obtained from or through the Waterfront Commission, established by compact between the States of New York and New Jersey. According to Commission rules, this labor must be ordered by 3 o'clock of each afternoon for the next morning and for a Monday morning by 3 o'clock in the afternoon of the preceding Friday.

Pier 5 is not normally operated on Saturdays or Sundays and at closing time on Friday, September 9, there were no plans to operate Pier 5, and it was not operated, on the following Saturday and Sunday.

On Monday morning, September 12, the labor ordered for that day showed up at 8 a.m. DST. There were 7 "gangs" of 23 men (including supervisor and 2 machine operators) and 70 "extra labor" or a total of 231 men. When they reported there were already high winds and heavy rain. The two ships refused to open hatches because of the rain. Some labor was receiving and delivering cargo. All other labor was put to work either placing extra pallets under the cargo tiers (to raise them higher) or nailing up doors which began to blow in during the morning. Through these efforts, extra pallets were placed under about 3% to 5% of the cargo on the pier.

Lunch hour for labor was from noon to 1 p.m. DST. About 1:20 p.m. DST, the water level reached the floor of the pier and all trucks were ordered off. From then until about 3:30 p.m. DST the pier was flooded. After 3:18 p.m. DST the water rapidly receded and as soon as it had left the floor, the work of reconstruction began.

Since the floor of the pier is 10 feet above mean low water, cargo on the floor of the pier would have been statistically in about 8 to 9 inches of water and cargo on

one pallet would have been statistically in about 2 to 3 inches of water. But having in mind wave action the cargo must have been in water to a greater depth—a depth up to as much as 36 inches. The damage for which these suits are brought came from this wetting.

6. The exclusion of business records

Libelants attempted to show through cargo damage surveyors that Pier 5 had been flooded a number of times before Donna. Those witnesses were permitted to testify to their observations of water damage to cargo on Pier 5 following earlier storms, but their reports (Exhibits 5 and 6 for identification) containing what they were told as to when the cargo arrived on Pier 5 and as to when and why it was water damaged were excluded (SM 86-97, 108-109). The reason for the exclusion was that while the reports may have been business records the particular information was not within the knowledge of the entrant nor did it appear that the information came from others under a duty to know the facts. *Johnson* v. *Lutz,* 253 N.Y. 124, 170 N.E. 517 (1930); McCormick on Evidence, 602-3.

The testimony of the surveyors does show, however, that during storms (or hurricanes) of November 25, 1950 and November 7, 1953 there was water above the floor of Pier 5. This would not appear from the statistics because the highest water level at Fort Hamilton during the 1950 storm was 9.2 feet above mean low water and during the 1953 storm it was 9.6 feet above mean low water; the floor of Pier 5 is 10 feet above mean low water. But wave action brings the water level at times above the recorded figures, as already noted.

The excluded reports therefore would have been merely cumulative in view of the findings made.

7. Reasonable care did not require that water damage from Hurricane Donna be foreseen and guarded against

The evidence establishes that the water damage from Hurricane Donna could not have been "guarded against by the ordinary exertions of human skill and prudence". *The Guilia,* cited above.

The principal evidence is that at the close of the business day on Friday, September 9, no one could reasonably have been expected to prepare for Donna hitting New York on Monday, September 12. Therefore respondents were not negligent when on Friday, September 9, at about 6 p.m. DST they left the cargo on Pier 5 in its then condition, that is, mostly on one pallet, 6 inches from the pier floor.

At that time, as already noted, Donna was about a hundred miles southeast of Key West and moving toward the west northwest at about 9 miles per hour. The official Weather Bureau advisory issued at that hour stated: "Subject to temporary and rather minor variations no material change is expected in intensity speed or direction during the next 12 hours".

The New York Times reported official forecasts for the New York City area from the United States Weather Bureau on September 9, 10 and 11 as follows (judicial notice being taken thereof):

from the issue of September 9 (page 58, column 2):

"Fair, warm today and tonight; highest temperature in the high 80's; highest temperature humidity

index in the high 70's; mostly southwesterly winds between 10 and 15 miles an hour; lowest temperature in the high 60's. Mostly fair, continued warm tomorrow."

from the issue of September 10 (page 42, column 6):

"Showers this morning followed by some cloudiness today; highest temperature near 80; highest temperature humidity index in the 70's; southerly winds becoming west to northwesterly between 10 and 15 miles an hour. Mostly fair tonight, lowest temperature in the 60's. Mostly fair, not as warm tomorrow."

from the issue of September 11 (page 95, column 1):

"Considerable cloudiness today; chance of showers by late evening; highest temperature in the 70's; highest temperature humidity index in the low 70's; north to northeasterly winds 10 miles an hour; cloudy with periods of rain tonight and tomorrow; lowest temperature in the 60's."

In addition, The New York Times carried a news story in the issue of Saturday, September 10 (page 1, column 3) containing these statements:

"In New York, the Weather Bureau said the hurricane would not produce effects on the weather here for two or three days, if then. Friday night's rains were said not to be associated with the hurricane."

From 7 a.m. EST on September 8 to 11 a.m. EST on September 11, Donna was passing through an area from which no hurricane had ever come to cause significant

damage in New York Harbor. Until 10 p.m. DST on Sunday, September 11, there was no warning from the Weather Bureau that Donna might reach New York Harbor. The head of the National Hurricane Center testified that on Friday, September 9, he had no concern that in sixty hours Hurricane Donna would be in New York. The head of the Weather Bureau office in New York testified (SM 283) that on Friday, September 9,

> "the hurricane was still moving in a west-northwest direction towards the southern tip of Florida and very slowly, and since the advisories indicated, and all the forecast information available indicated that it would continue on about the same track, we figured then that it would move very close to the southern tip of Florida, at least, and for that reason we did not become very excited about it affecting the New York City area especially over the weekend."

If this was the belief of the weather experts themselves, how possibly could the management of Pier 5 be found unreasonable in acting at the same time on the same belief?

This thought is clearly expressed in *Merchants Ice & Cold Storage Co.* v. *United Produce Co.*, 279 Ky. 519, 131 S.W. 2d 469, 471 (1939), also a flood damage case:

> "We find the rule in this character of case to be that a warehouseman is not responsible for loss resulting from an act of God, but that such a plea will not benefit him where he is warned of the approaching calamity and fails to use ordinary care to protect the goods or to remove them to a place of safety.

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". . . The United States Weather Bureau bulletin of January 20th was published in the morning newspapers on January 21st, and stated that a crest of 38 to 39 feet was expected the following Saturday with a probability of 42 feet 'early next week' if the rainfall should be as heavy as it was Sunday and Monday. The expert advice of the United States Weather Bureau was that the river would not reach a stage of 39 feet until Saturday, and this would lack reaching defendant's basement by 4 or 5 feet; if it reached a stage of 42 feet 'early next week' by reason of the heavy rains continuing, still the river would lack reaching the defendant's basement by 1 or 2 feet. Instead of defendant having warning and notice of the unprecedented rise of 6.3 feet from January 21st to January 22d, in a river that was then at the extreme high stage of 39.1 feet, it had what is generally regarded as expert information given out by the United States Weather Bureau that there would be no rise above 39 feet, and that figure was three days off, and under the most unfavorable conditions the rise would not exceed 42 feet 'early next week.' After the meteorologist, who had twenty-seven years' experience with the United States Weather Bureau, on January 20th predicted in effect that the defendant's warehouse would be safe by 5 feet until Saturday, there could have been no negligence on the part of defendant in following this prediction and assuming that the goods in its basement would be safe until the early part of the following week."

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The case for libelants is that hurricanes are erratic phenomena of nature; no two are alike or follow the same track; they cross, recross and recurve without seeming to obey any physical law; it is difficult to predict the course of a hurricane; the first part of September is the climax of the hurricane season. All these things are true.

Libelants then conclude that reasonable care required the pier operators to protect the cargo against the *possibility* of Donna hitting New York. This conclusion cannot be accepted. The conclusion would require protective efforts whenever *any* tropical storm or hurricane developed in the Atlantic west of the Cape Verde Islands, or in the Caribbean Sea, or in the Gulf of Mexico. Any such disturbance *could* take a course which would affect New York; prediction is almost impossible; therefore, say libelants, protective efforts are required.

This not only seems an unreasonable standard; its application would result in economic waste. In all but a few cases, the extensive and expensive labor involved would be unnecessary. Since 1938, only five hurricanes have seriously affected New York or an average of not more than one every five years.

Under these circumstances it seems entirely reasonable and prudent to rely on Weather Bureau warnings and to take action when such warnings have been given and not before.

In discussing negligence, the following comment appears in Restatement of the Law of Torts, § 302, page 818:

> "*Abnormal conditions of nature.* The actor is not required to anticipate or provide against conditions

> of nature or the operation of natural forces which are of so unusual a character that the burden of providing for them would be out of all proportion to the chance of their existence or operation and the risk of harm to others involved in their possible existence or operation. It is therefore not necessary that a particular operation of the natural force be unprecedented. The likelihood of its recurrence may be so slight that in the aggregate the burden of constantly providing against it would be out of all proportion great as compared with magnitude of the risk involved in the possibility of its recurrence."

Moreover, not even the efforts which libelants suggest were required could have protected the cargo. Libelants say that the cargo from Toreador (which sailed Friday evening, September 9) should have been discharged to three pallets instead of to one. This would have raised such cargo 18 inches above the pier floor. But the evidence is that water came up on September 12 to a height of 22 to 36 inches above the floor.

It is assumed that there had been occasions before Donna when water rose above the floor of Pier 5 but this does not affect my view as to what might reasonably be required of the pier operators in the period September 9-12, 1960. Unless they might reasonably have been expected to predict the passage of Donna through an area affecting New York Harbor, they could not reasonably be expected to guard against it.

It is true that from 10 p.m. DST on Sunday, September 11, the pier operators knew or should have known that

Donna was heading in such a direction and at such a speed as might produce high tides in New York Harbor on Monday morning, September 12. It is also true that nothing was done about the cargo on Pier 5 until 8 a.m. DST on Monday. As Libelants recognize, however, nothing could have been done about the cargo at 10 p.m. DST on Sunday night. Labor must be obtained from or through the Waterfront Commission and the Commission was not open on that Sunday night. Labor for Pier 5 for 8 a.m. DST Monday had been ordered at 3 p.m. DST on Friday, all in accord with Commission rules. The theory for libelants is that on Friday afternoon it was negligence for the operators of Pier 5 not to anticipate the coming of Donna on Monday morning and protect against it by working on Saturday and Sunday. This theory cannot be accepted in the face of the evidence of the location, speed and direction of Donna during all of Friday. If this evidence gave the Weather Bureau experts no cause at that time to believe that Donna would affect New York Harbor, it was reasonable for the Pier 5 operators to act on the same basis.

The evidence shows that respondents have not only carried the burden of proof, but have established, that reasonable care would not have foreseen and prevented the water damage from Donna.

8. The *World Products* decision

Libelants naturally place much reliance on *World Products, Inc.* v. *Central Freight Service, Inc.*, 222 F.Supp. 849 (D.N.J. 1963), affirmed, 342 F. 2d 290 (3d Cir., February 15, 1965). A warehouseman in Edgewater, New Jersey, was held liable in a diversity case for water dam-

age to goods in its warehouse during Hurricane Donna. The warehouse extended over the Hudson River.

There appear to be distinctions in fact between that case and the case at bar. For example, the Edgewater warehouse was only 3 to 4 feet above "normal high tide" (222 F.Supp. at 852). If "normal high tide" is the same as "mean high water" then the warehouse was 7.6 to 8.6 feet above mean low water, whereas Pier 5 was 10 feet above mean low water (mean high water correction to mean sea level is assumed to be 2.3, the same as the mean low water correction, see SM 257, but see SM 311).

The Court also found that "on a number of occasions prior to 'Donna', the waters of the Hudson must have risen to or above the level of the warehouse floor;" (222 F.Supp. at 852).

If there are no valid distinctions in fact between the two cases, then I must respectfully disagree with the result reached in the *World Products* case.

The foregoing includes the findings of fact and conclusions of law required by Rule 46½ of the Supreme Court Admiralty Rules.

The decrees must be for respondents, dismissing the libels on the merits.

Submit decrees on notice.

Dated: New York, New York
May 5, 1965

INZER B. WYATT
United States District Judge